130-482

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1885.**

No. 224.

THE CENTRAL TRUST COMPANY OF NEW YORK, APPELLANT,

*vs.*

LEWIS SEASONGOOD, SOLE SURVIVOR OF J. AND L. SEASONGOOD, AND B. G. STALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

**FILED FEBRUARY 24, 1886.**

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Bill of complaint | 3 | 1 |
| Order overruling pleas and granting leave to answer | 22 | 9 |
| Order appointing receiver | 22 | 9 |
| Order approving bond of receiver, &c | 26 | 11 |
| Order to sell property to satisfy claims, &c | 29 | 12 |
| Order to issue certificates of indebtedness to survivors | 34 | 14 |
| Resignation of Receiver Craig | 34 | 14 |
| Order appointing a new receiver | 36 | 15 |
| Order to pay claim, &c | 39 | 16 |
| Allowance of appeal | 40 | 16 |
| Supersedeas bond | 41 | 17 |
| Citation | 47 | 19 |
| Proof of service of citation | 48 | 20 |
| Clerk's certificate | 49 | 20 |


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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 9, 1888.

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and the western division of the southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, in said division and district aforesaid, on the first Tuesday of October, being also the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and tenth year of the Independence of the United States of America—present, the Honorable John Baxter, circuit judge, and the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

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| THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, &c.,<br>*vs.*<br>THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD Company, The Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman. | In Chancery. No. 3554. |

In the matter of the claim of Jacob Seasongood, Lewis Seasongood, and Bernard G. Stall.

2 Be it remembered that heretofore, to wit, on the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-three, came the said complainant herein, the said The Central Trust Company of New York, a corporation, &c., by Messrs. Hoadly, Johnson & Colston, its solicitors, and filed in the clerk's office of the court aforesaid in this cause its certain bill of complaint against the said defendants aforesaid herein, and which said bill of complaint so as aforesaid filed is clothed in the words and figures as follows, to wit:

3 *Bill of Complaint.*

Circuit Court of the United States, Sixth Circuit and Southern Dist. of Ohio, Western Division. In Chancery.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation,

*vs.*

THE TOLEDO, CINCINNATI AND ST. LOUIS RAILROAD COMPANY, THE Cincinnati Northern Railway Company, The Spring Grove, Avondale and Cincinnati Railway Company, and Grenville D. Braman.

Bill in equity.

To the judges of the circuit court of the United States for the southern district of Ohio:

The Central Trust Company of New York, a corporation under the laws of the State of New York and a citizen thereof, brings this its bill

of complaint against the Toledo, Cincinnati and St. Louis Railroad Company, claiming to be a corporation under the laws of Ohio, and the Cincinnati Northern Railway Company, a corporation under the laws of Ohio, and the Spring Grove, Avondale and Cincinnati Railway Company, a corporation of Ohio, and Grenville D. Braman, a citizen of the State of Massachusetts; and your orator complains and says—

4 That on the first day of October, A. D. 1880, the Cincinnati Northern Railway Company, a corporation under the laws of Ohio, being then engaged in the construction and equipment of a certain railroad and appurtenances from the city of Cincinnati, in the county of Hamilton and State of Ohio, northwardly in and through the counties of Hamilton, Butler, and Warren, in said State, to the village of Waynesville, in said county of Warren, did, by its president and secretary, under its corporate seal, and in pursuance of a resolution to that end adopted by the board of directors of said corporation on the 16th day of August, 1880, which was subsequently and before the execution of the bonds and of the indenture hereinafter mentioned duly ratified by all the stockholders of said corporation, execute one thousand of its bonds for the sum of one thousand dollars each, dated the said first day of October, A. D. 1880, payable on the first day of October, A. D. 1920, said bonds bearing six per cent. interest per annum, payable semi-annually, on the first days of April and October in each and every year, at the city of New York, each having interest warrants for thirty dollars each thereto attached for payment of the interest aforesaid; and said Cincinnati Northern Railway Company issued and sold one thousand of said bonds, with said interest warrants attached, which are now in

5 the hands of divers and sundry persons as holders thereof, and with the proceeds of sale of said bonds the said corporation constructed and equipped said railway.

And your orator further represents that, in order to secure said bonds and the payment of the said interest as the same should mature, the said Cincinnati Northern Railroad Company did, on said day, in pursuance of the further provisions of said resolution, execute and deliver unto your orator a certain deed or indenture, whereof a true copy is hereto attached, marked Exhibit A, and thus made part of this bill, which indenture was duly recorded on the 17th day of November, A. D. 1880, in the several counties in and through which said railway extended, whereby it did grant, bargain, sell, and convey, in fee simple, unto your orator, its successors and assigns, all and singular the aforesaid railroad, known as the Cincinnati Northern Railway, from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through and into the counties of Hamilton, Butler, and Warren, in the State of Ohio, about forty-two miles in length, constructed and to be constructed, together with all the real and personal property of said company connected with said railroad and its incomes derived therefrom and its lands, tenements, and hereditaments; rights of

6 way, fixtures, buildings, bridges, structures, fences, railways, and branches; side tracks, rails, ties, locomotives, tenders,

engines, cars, carriages, equipment, rolling-stock, machinery, tools, implements, material, chattles, franchises, and privileges; rights, interests, income, rents, reservations, resources, benefits, investments, assets, and estates, legal and equitable, which were then owned or should thereafter be owned or acquired by said company as part of or in connection with the said railroad or in any way appertaining or belonging to said railroad; and also all the personalty and movable property of the said Cincinnati Northern Railway Company, including all its locomotives, engines, tenders, cars, carriages, equipment, rolling-stock, machinery, tools, implements, material, chattels of every kind and character, wherever used or situated, whether upon the line of said company's railroad or elsewhere, then owned or thereafter to be acquired by said company; to have and to hold the above-mentioned property and assets thereby conveyed or intended to be conveyed, with all and singular the reversions, remainders, issues, privileges, and appurtenances then or thereafter belonging or in anywise appertaining thereto, unto your orator and to its successors and assigns forever—in trust, nevertheless, for the persons and corporations and for the benefit, security, and protection of the persons, firms, and corporations who should hold the bonds
7 and interest warrants aforesaid or any or either of them, and for enforcing the payment thereof, when payable, in accordance with the true intent and meaning of the stipulations of said deed of trust or mortgage and of said bonds and of said interest warrants.

And your orator further states that, in and by said mortgage or deed of trust to your orator, it was provided, and the said Cincinnati Northern Railway Company did therein covenant and agree, that if any default should be made in the payment, when due, of any interest upon any of said bonds, and such interest should remain unpaid and in arrear for the space of three months, or in case of default made in the payment of the principal of any of said bonds, then the said Cincinnati Northern Railway Company should, upon demand of your orator or the trustees of said trust deed for the time being, forthwith surrender to your orator or such trustees or their agent or agents the actual pos-session of all and singular the property, assets, and estate conveyed or intended to be conveyed in said indenture, to hold, use, manage, and receive the rents, issues, and income, and profits thereof for the benefit of the holders of said bonds, making from time to time all needful repairs and alterations and additions and paying all proper costs, charges, and expenses of so taking, holding, and managing the same, including a
8 reasonable compensation to said trustee or trustees, from the income thereof, and applying the residue to the payment *pro rata* to and among the parties entitled thereto, of the overdue interest on said bonds, with interest thereon and the interest accruing during such possession; but such possession was not to be taken unless your orator or such other trustee should be thereto requested in writing by the holders of at least one-third in amount of said bonds.

And your orator further represents that it was also provided in

said mortgage or deed of trust that, if any default should be made in the payment when due of interest on any of said bonds when and as it might accrue, then, upon the happening of any such default, your orator or any successor to it in the trusts of said deed might take proper legal proceedings to enforce the rights of the holders of said bonds upon being thereto requested in writing by the holders of one-third in amount of the bonds aforesaid; and that the proceeds arising from any sale made in pursuance thereof should be applied, first, to pay your orator or such other trustee all reasonable costs, charges, and expenses, and to indemnify it or them against all liability in the premises; second, to pay the holders of said bonds in full or in equal proportion the principal and interest of
9 said bonds then outstanding without priority in lien of interest over principal or of one bond over another; third, the surplus, if any, remaining after the payment in full of all said bonds, principal and interest, including the interest on overdue interest, should be paid to your orator, its successors and assigns.

And your orator further represents that it was provided in said mortgage or deed of trust that upon a sale of said premises and property by virtue of the judgment and decree of any court of competent jurisdiction, rendered in any suit or proceeding for the enforcement or foreclosure of the lien of said trust deed or mortgage, the principal of all the aforesaid bonds should become and be immediately due and payable; and it was further provided therein that upon payment in full of the interest and principal of said bonds said deed of trust or mortgage should be null, void, and of no effect.

And your orator further represents that the said Cincinnati Northern Railway Company has failed to pay the interest on said bonds and has made default therein to all the holders thereof, and, among others, to Charles Rice, a holder of eleven of said bonds, to whom, as well as to all the holders of said bonds and coupons, said company has failed to pay the interest warrants or coupons due
10 thereon October 1st, A. D. 1882, and April 1st, A. D. 1883, and the same have ever since remained unpaid, although payment of the same was duly demanded at the city of New York, and the holders of one-third in amount of said bonds to whom such default has been made have served upon your orator a written demand requiring your orator to institute the necessary legal proceedings to foreclose said mortgage and sell the said railway and property of the Cincinnati Northern Railway Company and for the appointment of a receiver of said property separately, and to take such other and further steps necessary and proper for the protection of the rights of the holders of said bonds as your orator may be authorized to take by said deed of trust or mortgage. And your orator deems it for the interest of the parties concerned, particularly of the holders of the said first-mortgage bonds and coupons, to institute judicial proceedings for the foreclosure of said mortgage or deed of trust and for the sale of all the premises and property thereby conveyed, and for the appointment of a separate receiver to take possession of, operate, and control the said railroad and its branches and leased lines, and to take an inventory of all the personal or movable prop-

erty included in said mortgage and to keep an account of the earnings and of the expenses incurred in operating the said railway and its leased lines.

11 And your orator further says that on and prior to the 25th day of April, A. D. 1881, the Spring Grove, Avondale and Cincinnati Railway Company was a corporation, duly organized under the laws of Ohio, engaged in locating, constructing, and equipping a line of railway from a point in the city of Cincinnati, Hamilton county, Ohio, south of Court street and west of Broadway, to Spring Grove Cemetery, in said county, and part of said road had at that time been constructed and was ready for use; and thereafter, on or about said last-named day, said Cincinnati Northern Railway Company leased, for a term of ninety-nine years, renewable forever, the tracks, road-bed, rights of way, property, privileges, and franchises then owned or thereafter to be acquired by the said Spring Grove, Avondale and Cincinnati Railway Company, with the privilege of purchasing the same at any time after three years for the sum of five thousand dollars; and in consideration of the said lease the said Cincinnati Northern Railway Company, among other things, agreed to and did execute and deliver to your orator on the 25th day of May, 1881, its certain deed of trust by way of mortgage, a true copy whereof is filed with this bill as Exhibit "B," whereby it conveyed to your orator, as such trustee, all its property, rights, and franchises whatsoever then owned or there-

12 after to be acquired by it to secure the payment, as the same might mature, of the principal and interest of one million dollars of mortgage bonds theretofore issued by the said Spring Grove, Avondale and Cincinnati Railway Company, secured on its said road, payable July 1st, 1921, with interest warrants thereto attached for the payment of interest thereof at the rate of six per cent. per annum, payable semi-annually on the first days of January and July of each and every year.

And it was therein and by said last-named deed of trust or mortgage agreed by and between your orator and the said Cincinnati Northern Railway Company that the lien of said mortgage should be second only to the lien of the deed of trust or mortgage upon the same property, rights, and privileges hereinbefore set forth.

And your orator further says that the interest on said bonds has not been paid, but that both the said Spring Grove, Avondale and Cincinnati Railway Company and the said Cincinnati Northern Railway Company have failed to pay the same, and have made default therein to all holders of said bonds to whom said companies have failed to pay the interest warrants or coupons thereon due the first day of January, 1883, and the first day of July, 1883, and the same have never been paid.

13 And your orator represents further that the foregoing mortgage was duly recorded in the proper counties, and that the same is a second lien or incumbrance upon all the premises and property hereinbefore described and mentioned of the said Cincinnati Northern Railway Company.

And your orator further represents that the said Cincinnati

Northern Railway Company—proper corporate action for that purpose having first been had—did, on the 25th of May, A. D. 1881, deliver to your orator, as trustee, a certain other indenture (a true copy whereof is herewith filed as Exhibit "C"), whereby it granted, bargained, sold, and conveyed unto your orator, as trustee, all the railroad, property, rights, franchises, goods, and chattels described or mentioned in the mortgage first set forth in this bill, then owned and thereafter to be acquired, to secure the payment at maturity of the principal of one thousand bonds of the said Cincinnati Northern Railway Company, known as income bonds, for one thousand dollars each, numbered, consecutively, from 1 to 1,000, inclusive, payable on the 1st day of April, 1921, and of such interest upon the said bonds as by the terms of said bonds and of said indenture might be due and payable.

And your orator further says that it was by said indenture last mentioned expressly agreed that the interest upon said bonds was not to accrue or to be payable except out of net earnings of
14 said Cincinnati Northern railway applicable to that purpose, and when the amount thereof should be ascertained and declared by said board of directors of said last-named company, whose duty it was by the terms of said indenture in each year during the currency of said bonds, beginning with the year 1882, in the month of January, to declare what amount, if any, of net earnings had been made during the preceeding year which was justly applicable to the payment of interest on said income bonds, and such ascertainment of net earnings was to be made by deducting from gross earnings all operating expenses, including rebates, taxes, insurance, rent, interest on floating debt and borrowed money, and payment made on principal thereof, and liabilities for interest on the said first-mortgage bonds of the said railway company.

And your orator further says that said mortgage was duly recorded in each of the various counties in and through which the said railway extended.

And your orator further represents, on information and belief, that one thousand of the said bonds so secured as aforesaid by said indenture have been issued and disposed of by said Cincinnati Northern Railway Company and are now in the hands of divers and sundry persons, as owners thereof, unknown to your orator.

15 And your orator further represents that no interest has become or is now due or payable on said bonds under the terms thereof and of said indenture, owing to insufficiency of earnings, but that the principal of said bonds issued as aforesaid is a lien upon said property, rights, franchises, etc., of said Cincinnati Northern Railway Company next after the mortgage hereinbefore secondly described.

And your orator further says that on the fifth day of May, A. D. 1883, a certain corporation by the name of the Toledo, Cincinnati and St. Louis Railway Company, claiming to be a corporation of the States of Ohio, Indiana, and Illinois by virtue of certain consolidations, and claiming to have power to construct, maintain, and operate a railroad from the city of Toledo, in the State of Ohio, to the

town of Delphos, in said State, and thence through the States of Indiana and Illinois into the city of East St. Louis, in said last-named State, and from the said town of Delphos to a connection with the said railroad of the Cincinnati Northern Railway Company at or near Dodd's, in the county of Warren, in the State of Ohio, entered into an agreement with the said Cincinnati Northern Railway Company and the said Spring Grove, Avondale and Cincinnati Railway Company, corporations as aforesaid, whereby said three cor-
16 porations undertook, under the name of the Toledo, Cincinnati and St. Louis Railroad Company, to consolidate and unite the said lines of railroad at their respective points of connection, and to consolidate the capital stock of the said respective companies under the laws of Ohio, and to transfer and vest in said consolidated company—to wit, the Toledo, Cincinnati and St. Louis Railroad Company, defendant in this bill of complaint—all the powers, privileges, immunities, and property, real, personal, and mixed, belonging to the respective companies parties to said agreement of consolidation, said consolidated company expressly recognizing and affirming the said several mortgages hereinbefore mentioned and the said bonds and coupons secured thereby and assuming payment of same; the capital stock of said consolidated company to be thirty millions of dollars, of which eleven millions was to be preferred stock and the balance thereof to be common stock. A true copy of said agreement of consolidation is filed herewith as Exhibit D, to which reference is made as part of this bill.

And your orator further represents that it is informed and believes that said agreement of consolidation was acted under by said companies from said date, although your orator says neither it nor any holder of said bonds or coupons was party to said consolidation or has assented thereto or acquiesced therein.

17 And your orator further says that it is claimed by the said consolidated company, the said Toledo, Cincinnati and St. Louis Railroad Company, that it owns, by virtue of said consolidation, all the aforesaid property, real, personal, and mixed, rights, franchises, and assets and credits of the said Cincinnati Northern Railway Company, and of the said Spring Grove, Avondale and Cincinnati Railway Company, and that the same have become subject to the debts and liabilities of the said consolidated company; but your orator says that whatever rights, if any, in or to the same the said Toledo, Cincinnati and St. Louis Railroad Company acquired by virtue of said consolidation, the same are subject and subordinate to all the mortgages hereinbefore stated, and that the railroad, property, franchises, rights, and assets of the said Cincinnati Northern Railway Company are not, nor were they at the time of said consolidation, more than sufficient to pay its said first-mortgage bonds and interest secured thereon by said first mortgage, and are of much less value than the amount of all the bonds and interest secured thereon by the several mortgages hereinbefore mentioned; but your orator says that the net earnings of the said Cincinnati Northern railway and of the said Spring Grove, Avondale and Cincinnati Railway Company are sufficient, as it believes, if

18 kept separate, to pay the interest warrants or coupons of said first-mortgage bonds of said Cincinnati Northern Railway Company, but that the Toledo, Cincinnati and St. Louis Railroad Company claims that the earnings of the said Cincinnati Northern Railway Company and its said leased line should go into the common fund of said consolidated company, and that no account should be kept of the separate earnings and expenses thereof, and the earnings and income of the said Cincinnati Northern Railway Company and its said leased line are now, and ever since said consolidation have been, received and taken by said consolidated company, the said Toledo, Cincinnati and St. Louis Railroad Company, which is hopelessly insolvent, and appropriated to pay the expenses of said consolidated company and wholly diverted from the payment of the interest or any part thereof due upon the said bonds of the said Cincinnati Northern Railway Company.

And your orator further says that unless such separate account of the earnings and expenses of said Cincinnati Northern Railway Company be carefully kept and preserved it will be impossible to ascertain whether any interest shall have become due or payable upon the income bonds hereinbefore described.

Wherefore, and forasmuch as your orator is without remedy
19 at law, your orator brings this its bill of complaint in equity in behalf of all the holders of bonds and coupons secured by said mortgage herein first mentioned, and prays that Grenville D. Braman, who claims some interest, and the said The Spring Grove, Avondale and Cincinnati Railway Company be made defendants hereto, and the said consolidated company, the Toledo, Cincinnati and St. Louis Railroad Company, may be made to answer as to its interest; that process of subpœna may issue against each of them, and that they be required to make answer, respectively, to all and singular the allegations and charges herein contained; that said mortgaged property be separately sold at judicial sale, free of the claims of all parties hereto, upon such terms and conditions as this honorable court may deem most to the interest of the holders of said first-mortgage bonds and coupons, and that out of the proceeds of such sale the amount of bonds and interest secured by said first mortgage or deed of trust to your orator may be paid to your orator for the holders thereof, respectively, and that the balance, if any, of said proceeds of sale may be paid to your orator as trustee for the holders of said bonds and coupons secured by said second and third mortgages on said Cincinnati Northern railway in the order of priority; and that meanwhile and until such sale a re-
20 ceiver, other than the receiver heretofore appointed for the said consolidated company, may be appointed of all and singular the premises and property aforesaid embraced within the said mortgage or deed of trust hereinbefore first set forth, and that he may be authorized and empowered to maintain and operate said railway of the said Cincinnati Northern Railway Company, including said Spring Grove, Avondale and Cincinnati railway, and to exercise all the powers usually granted to receivers, and to receive and collect all rents and other income from any of said mortgaged

property, and to preserve the same and all parts of the said mortgaged premises and property from waste and loss, and to pay the rent on leased premises, and to carry out such contracts and agreements of said Cincinnati Northern Railway Company as may be to the interest of the said several parties therein interested; and for such other and further relief as in equity and good conscience your orator may be entitled to.

HOADLY, JOHNSON & COLSTON,
*Counsel for the Central Trust Company of New York.*

21 UNITED STATES OF AMERICA, }
*State of Ohio, Hamilton County,* } *ss:*

Edward Colston, being duly sworn, says he is agent for the Central Trust Company of New York, complainant in above bill, and that the facts therein stated are true, and such as are stated on information or belief are true as he believes.

EDWARD COLSTON.

Sworn to before me and subscribed in my presence this 11th day of August, 1883.

[L. S.] JOHN FLACK WINSLOW,
*Notary Public, Hamilton County, Ohio.*

40 cts.: p'd by H. J. and C.

22 And afterwards, to wit, on the 20th day of October, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

*Journal Entry V*, 162.

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| THE CENTRAL TRUST CO. OF N. Y. *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Cincinnati Northern Railway Company, The Spring Grove, Avondale & Cincinnati Railway Company, and Grenville D. Braman. | Chancery. | No. 3554. |

This cause came on to be heard upon the bill of complaint and upon the respective pleas of The Toledo, Cincinnati & St. Louis Railroad Company and of Grenville D. Braman, filed in this cause on the 17th day of September, A. D. 1883; upon consideration whereof it is ordered, adjudged, and decreed that each of said pleas is insufficient in law, and each of the same is overruled, and each of said defendants is given leave to answer to said bill of complaint.

And said cause coming on further to be heard upon the motion of the said The Central Trust Company of New York for the appointment of a receiver of all and singular the premises and prop-

erty and assets, real and personal, of the said Cincinnati
23 Northern Railway Company (and of its said leased line, described in said bill of complaint as the Spring Grove, Avondale & Cincinnati railway) owned by said Cincinnati Northern Railway Company at the time of its consolidation with the said Toledo, Cincinnati & St. Louis Railway Company, as averred in said bill of complaint of the said Central Trust Company of New York; upon consideration whereof it is now, by Hon. John Baxter, judge of said circuit court, ordered, adjudged, and decreed that William J. Craig be, and he hereby is, appointed receiver herein of all and singular the premises, property, money, and assets owned by the said Cincinnati Northern Railway Company (including said leased line), or to which it was entitled at the time of its said consolidation with said Toledo, Cincinnati & St. Louis Railroad Company, upon his giving bond, with security, to be approved by the Hon. John Baxter, circuit judge, or by the Hon. George R. Sage, sitting in the circuit court in said district, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duties as such receiver, and for obeying all lawful orders of the court herein, and that as such receiver he is hereby ordered and directed to take possession of, maintain, and operate the said railroad and premises described in the said bill of complaint, being the railroad of the Cincinnati Northern Railway Company, extending from Cincinnati, in Hamilton county, Ohio, to Waynesville, in Warren county, Ohio, and passing through
24 and into the counties of Hamilton, Butler, and Warren, in said State of Ohio, being about forty-two miles in length, constructed and to be constructed; also to take possession of, maintain, and operate as the property of said Cincinnati Northern Railway Company the said leased line described in said bill and known as the Spring Grove, Avondale & Cincinnati railway, extending from a point in the city of Cincinnati, in said Hamilton county, Ohio, south of Court street and west of Broadway, in said city, through the counties of Hamilton and Butler, in said State of Ohio, to the town of Venice, in said Butler county, and to take possession of all the property, real and personal, owned by the said Cincinnati Northern Railway Company, or to which it was entitled at the date of its consolidation with the said Toledo, Cincinnati & St. Louis Railroad Company, and the equipment, income, franchises, and appurtenances thereof, as well as lands and other premises and property belonging to said Cincinnati Northern Railway Company at said time, as fully described in said bill of complaint, reference whereto for greater certainty is had and made; and said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity to take charge of, care for, and operate said railroad, including said leased line; to make reports of his acts and doings to this court at least every two months, or oftener if required by the court; to collect and receive the tolls, incomes, issues, rents, and profits of said premises, and out of the same to make such repairs as may be
25 necessary to preserve and keep the same in a safe and proper condition; and said receiver is hereby authorized to operate

said railroad, including said leased line, in connection with any other or others of the constituent roads of the said Toledo, Cincinnati & St. Louis Railroad Company, of which he may be appointed receiver, but is hereby directed to keep the accounts of the earnings and expenditures of the said Cincinnati Northern Railway Company seperate from the earnings and expenditures of any of the other of the constituent roads of the said Toledo, Cincinnati & St. Louis Railroad Company, except the said Spring Grove, Avondale & Cincinnati Railway Company; and the said defendants, The Cincinnati Northern Railway Company and The Toledo, Cincinnati & St. Louis Railroad Company, are hereby ordered and directed to deliver to the said William J. Craig, receiver, possession and control of all the property, rights, and privileges of every kind belonging to the said Cincinnati Northern Railway Company and to the said Spring Grove, Avondale & Cincinnati Railway Company at the time of the consolidation of said respective companies with the said The Toledo, Cincinnati & St. Louis Railroad Company.

And it is further ordered that said receiver make and file in this court a true inventory of all the cars, engines, rolling-stock, material, or supplies belonging to or in possession of said Cincin-
26 nati Northern Railway Company at the time of its said consolidation, as well as of all property coming into his possession by virtue of this order.

And said receiver is further ordered to keep the accounts of all through freight and passenger business over said constituent roads so that the receipts therefrom may be duly apportioned between the same as the court may hereafter direct.

To the judgment of the court overruling the said pleas of said Braman and of said T., C & St. L. railroad the said Braman and said Toledo, Cincinnati and St. Louis Railroad Company except, and they except to the order of the court appointing a receiver.

And afterward, to wit, on the 1st day of November, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in words and figures as follows, to wit:

*Journal Entry V*, 183.

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| THE CENTRAL TRUST CO. OF N. Y. *vs.* THE TOLEDO, CINCINNATI AND ST. LOUIS RAILroad Company, The Cincinnati Northern Railway Company, *et al.* | Chancery. | No. 3554. |

This day came William J. Craig, heretofore appointed receiver of the Cincinnati Northern railroad, and filed herein his
27 bond in the sum of ten thousand dollars, which is approved by the court, and thereupon came the said William J. Craig and took the oath prescribed by law and was duly qualified.

28 And afterward, to wit, on the 8th day of December, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this behalf, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

29 *Journal Entry V*, 211.

In the Circuit Court of the United States for the Southern District of Ohio, Western Division. In Equity.

THE CENTRAL TRUST COMPANY OF NEW YORK, a Corporation, Complainant,
*against*
THE TOLEDO, CINCINNATI & ST. LOUIS R. R. Co., CINCINNATI NORTHERN R'Y *R'd* Co., *et al.*, Respondents. } 3554.

Entry.

It appearing to the court that the superior court of Cincinnati, in general term, in cause No. 2350, wherein Jacob Seasongood, Louis Seasongood, and Bernard G. Stall are plaintiffs, and The Central Trust Company of New York and others are defendants, has found that certain real estate belonging to said plaintiffs, situate in the city of Cincinnati, Ohio, and being lots 13, 14, and 15 of S. Kemper's subdivision, in section 7, town. 3, fractional range 2, Miami purchase, is occupied by the Cincinnati Northern Railway Company under an agreement entered into between said plaintiffs and the Miami Valley Narrow-Gauge Railway Company, the predecessors of the said The Cincinnati Northern Railway Company, and
30 that there is due to said plaintiffs thereon the sum of seventy-eight hundred and six and $\frac{22}{100}$ ($7,806.22) dollars, with interest on the same from the 29th day of May, 1883, and that said plaintiffs are entitled to be paid on the 29th day of August, 1886, under said agreement, the further sum of sixteen thousand five hundred ($16,500.00) dollars, with interest thereon at the rate of 7 % per annum, payable quarterly, from the 29th day of May, 1883, and all taxes they may be required to pay in the mean time; and it further appearing to this court that said superior court of Cincinnati has adjudged and decreed that said plaintiffs have a first and prior lien on said lots for the payment of said sums so found to be owing to them, and has ordered that in the event of so much of said lots as may not be necessary for the purposes of said railway company being sold and proving insufficient to pay said claims, then that the whole of said railway be sold to pay the same; and it further appearing to this court that the portion of said lots not necessary for the purposes of said railway are insufficient to pay said claims, and that an order of sale has been issued by said superior court directing the apprais-ment and sale of the whole of said railway, and that said parties are proceeding to bring the same to sale in pursuance thereof; and it further appearing to the court that
31 such sale would be contrary to the best interests of all concerned, and that it is necessary to the operation of said road

by the receiver heretofore appointed herein that said proceedings to sell should be stopped; and it further appearing to the court that said parties are willing to have so much of said lots as are not necessary for railroad purposes sold by the master commissioner appointed by said superior court in said cause, and the proceeds arising therefrom credited upon the certificate of indebtedness hereinafter provided to be issued to them, and to accept as full satisfaction of all their remaining rights under said decree (and enter satisfaction of the same and convey said right of way to said railway) certificates of indebtedness, to be issued by the receiver herein, bearing interest at the rate of six (6) per cent. per annum and payable when the said railroad shall be sold by the order of this court herein, unless sooner paid out of the earnings from the operation of said road or otherwise, as the court may order, provided the same be made a first lien upon said road, except only such other certificates as the court may find it necessary to issue, with all which they shall be of equal priority:

Now, therefore, in consideration of the premises, it is ordered by the court that the master commissioner in said case in said
32 superior court be authorized to proceed and sell under his order said outlying strips which were found not to be necessary for said right of way, and, after paying the costs of said action and taxes, to apply the balance of the purchase-money on said certificate and pay the same to said Seasongoods and Stall.

And by agreement it is ordered that in the event that said case in said superior court shall be taken to the superior court of Ohio by motion for leave to file within thirty (30) days, and leave shall be granted and bond given, then said certificate to be returned.

Nothing herein contained shall prejudice the right of defendant to prosecute a proceeding in error in the supreme court of Ohio within said thirty (30) days.

And it is ordered by the court that W. J. Craig, receiver herein, be, and he hereby is, authorized and directed to issue to said Jacob Seasongood, Louis Seasongood, and Bernard G. Stall his certificate of indebtedness in the sum of twenty-five thousand one hundred and seventy-six and $\frac{2}{100}$ ($25,176.20) dollars, that being the total amount of the said claims on the 8th day of December, 1883, dated this 8th day of December, 1883, and bearing interest at the rate of six per cent. (6) per annum from date and payable on or before one
33 year after date to the order of said parties, said certificate to be equal in priority with all other certificates that may be issued herein, but to be prior to all other liens and to be paid first upon sale of this road, and the same to deliver to said parties upon the entering by them of satisfaction of all their claims under said judgment and decree in said superior court, and the execution and delivery by them of a proper deed of conveyance of said lots to said Cincinnati Northern Railway Company; and it is further ordered that upon the consum-ation thereof the said The Cincinnati Northern Railway Company shall stand subrogated to all the rights the said parties had against the said The Miami Valley Narrow-Guage Railway Company and the stockholders thereof.

34 And afterward, to wit, on the 12th day of February, in the year of our Lord one thousand eight hundred and eighty-four, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

*Journal Entry V, 252.*

THE CENTRAL TRUST COMPANY
*v.*
THE T., C. AND ST. L. R. R. CO. *et al.* } Chancery. No. 3554.

It appearing to the court that since the order was made herein authorizing and directing the receiver to issue a certificate to Jacob Seasongood, Lewis Seasongood, and B. G. Stall the said Jacob Seasongood has died, it is ordered by the court that said receiver be, and he hereby is, authorized and directed to issue said certificate to Lewis Seasongood and Bernard G. Stall, the survivors of said Jacob Seasongood, upon the same terms and conditions named in said original order.

And afterward, to wit, on the 16th day of July, in the year last aforesaid, came the said William J. Craig, so as aforesaid heretofore appointed receiver herein by the court aforesaid, and tendered his resignation as receiver of the said Cincinnati Northern railway to the court aforesaid, and which said resignation is clothed in words and figures as follows, to wit:

*Resignation of W. J. Craig, Receiver.*

35 In the Circuit Court of the United States, Southern District of Ohio, Western Division.

THE CENTRAL TRUST CO. OF NEW YORK, a Corporation, as Trustee, etc.,
*v.*
THE CINCINNATI NORTHERN RAILWAY CO., The Spring Grove, Avondale & Cincinnati Railway Co., T., C. and St. L. R. R., *et al.* } In Equity. No. 3554.

To the honorable judges of said court:

I respectfully call the attention of your honors to the fact that by reason of the sale and transfer from my possession of the Cincinnati Division, the Dayton & Southeastern Division, the Iron railroad, and the Dayton Division, constituent roads of the Toledo, Cincinnati & St. Louis R. R., I am practically cut off from the Cincinnati Northern railway, of which I am also receiver, and that by reason of my being so cut off from it, and by reason of the further fact that I am compelled, in the operation of the other branches of the Toledo, Cincinnati & St. Louis railroad, to retain my main office at Toledo, Ohio, it is made well nigh impossible for me to further operate the

Cincinnati Northern railway, except at very great disadvantage. In view of the premises, I therefore hereby respectfully tender to the court my resignation as receiver of the said The Cincinnati Northern Railway Company, to take effect when possession is delivered of the other said divisions.

36 Very respectfully,
(Signed) W. J. CRAIG.

And afterward, to wit, on the 18th day of July, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

*Journal Entry V*, 451.

| | | |
|---|---|---|
| THE CENTRAL TRUST CO., a Corporation, *v.* THE TOLEDO, CINCINNATI AND ST. LOUIS Railroad Company, The Cincinnati Northern Railway Co., The Spring Grove, Avondale & Cincinnati Railroad Co., & Grenville D. Braman. | Chancery. | No. 3554. |

Geo. Hafer appointed receiver.

And now, this day, this cause came on to be heard upon the application of the complainant in this cause for the appointment of a receiver of the said Cincinnati Northern railway in the place and stead of William J. Craig, Esq., whose resignation was presented to this court on the fifteenth instant and is now accepted, and the court being fully advised in the premises, it is ordered, adjudged, and decreed that Georg- Hafer be, and he hereby is, appointed receiver herein of all and singular the premises, property, money, and assets owned by the said Cincinnati Northern Railway Company (including the leased line, known as the Spring Grove, Avondale and Cincinnati railway) or to which it was entitled at the time of its consolidation with the said Toledo, Cincinnati and Saint Louis
37 Railroad Company, upon his giving bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties as such receiver, and for obeying all the orders of this court herein, with surety to be approved by the court, and as such receiver he is hereby directed to take possession of, maintain, and operate the said premises and railroad described in the bill of complaint herein; and said receiver is hereby clothed with all the authority and rights usually given to a receiver by courts of equity to take charge of, care for, and operate said railroad, including said leased line; to make reports of his acts and doings to this court at least every month or oftener, if required by the court, and to collect and receive the tolls, income, rents, & profits of said premises and property, and out of the same to make such repairs as may be necessary to preserve and keep the same in a safe and proper condition.

And the said W. J. Craig, the former receiver, is hereby directed to deliver and turn over to the said George Hafer, as receiver, all property in his possession as receiver under the former order of this court herein.

And thereupon came the said George Hafer and produced to the court his bond, as receiver in this cause, with Joseph W. Wilshire, John Ryan, Anthony D. Bullock, and J. A. Kinney as his sureties thereon, and the same being found satisfactory, the said bond is now approved by the court, and the said George Hafer was thereupon sworn and qualified as such receiver.

38 And afterward, to wit, on the 20th day of November, in the year of our Lord one thousand eight hundred and eighty-five, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

39 *Journal Entry W*, 261.

The United States Circuit Court for the Southern District of Ohio, Western Division. In Chancery.

THE CENTRAL TRUST COMPANY OF NEW YORK
*against*
THE TOLEDO, CINCINNATI and ST. LOUIS RAILROAD CO., THE CINCINNATI NORTHERN RAILWAY COMPANY, *et al.*

Decree ordering payment to L. Seasongood.

It appearing to the court from the report of the master commissioner of the sale of the Cincinnati Northern railroad that there are sufficient of the proceeds of said road to pay the full amount of the claim of J. and L. Seasongood and Stall and interest, for which a receiver's certificate was issued to Lewis Seasongood and B. G. Stall, survivors of Jacob Seasongood, after paying all other certificates of the receiver of said Cincinnati Northern Railroad Company; that said money remain- unpaid; that since said decree ordering said certificate to be issued said B. G. Stall and said Jacob Seasongood have died, leaving said Lewis Seasongood the sole survivor; that the certificate was issued to Lewis Seasongood and B. G. Stall as survivors after the death of said Jacob Seasongood, and that out of the proceeds of sale of said outlying strips of land on
40 July 8th, 1884, there was paid to said Lewis Seasongood and B. G. Stall, survivors, the sum of $525.33, which is all that was left after paying the costs of said action in the supreme court of Cincinnati and some taxes on said strips, which should be credited as of that date upon said certificate, which leaves a balance, with interest computed to November 12th, 1885, of $27,562.90 due and owing on said decree:

It is therefore ordered by the court that the purchasers of said railroad pay to the clerk of this court said sum of $27,562.90, with interest from November 12th, 1885, until paid, and that said clerk pay forthwith to said Lewis Seasongood, survivor, said sum of

$27,562,90, and until so paid he is entitled and shall be paid by said clerk 6 per cent. interest thereon from Nov. 12th, 1885.

It appears further to this court that said case in said supreme court of Cincinnati was not carried to the supreme court of Ohio.

Therefore the Central Trust Company, complainant, prays an appeal in open court of this cause to the supreme court, and this court grants the appeal and fixes the amount of bond at double the amount of said claim and interest, to wit, fifty-five thousand and five hundred dollars, which bond shall operate as a supersedeas of this order and decree.

41 And afterward, to wit, on the 19th day of December, in the year last aforesaid, came the said complainant aforesaid herein, by its solicitors, and filed herein, in the clerk's office of the court aforesaid, in this behalf its certain supersedeas bond, and which said supersedeas bond so as aforesaid filed is clothed in the words and figures as follows, to wit:

*Supersedeas Bond.*

Circuit Court of the United States, Western Division.

THE CENTRAL TRUST COMPANY OF NEW YORK, Trustee,
*v.*
THE TOLEDO, CIN. & ST. LOUIS RAILROAD COMPANY *et al.*

Know all men by these presents that we, The Central Trust Company, trustee, as principal, and Joseph W. Wilshire, George Wilshire, Joseph N. Kinney, Briggs Swift, George Hafer, and Augustus S. Winslow, as sureties, are held and firmly bound unto Lewis Seasongood, sole survivor of J. & L. Seasongood and B. G. Stall, in the sum of fifty-five thousand and five hundred dollars, to be paid to the said Lewis Seasongood, sole survivor as aforesaid, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and our and each of our heirs, executors, and administrators, firmly by these presents.

42 Sealed with our seals. Dated this 19th day of December, 1885.

Whereas the above named The Central Trust Company, trustee, has taken out an appeal to the Supreme Court of the United States to reverse the order rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Central Trust Company, trustee, shall prosecute its said appeal to effect and answer all damages — costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

| | | |
|---|---|---|
| (Signed) | JOS. W. WILSHIRE. | [SEAL.] |
| (Signed) | GEORGE WILSHIRE. | [SEAL.] |
| (Signed) | JOSEPH N. KINNEY. | [SEAL.] |
| (Signed) | BRIGGS SWIFT. | [SEAL.] |
| (Signed) | GEORGE HAFER. | [SEAL.] |
| (Signed) | AUGUSTUS S. WINSLOW. | [SEAL.] |

Sealed and delivered in presence of—
(Signed) ROBERT C. GEORGI.
(Signed) CHAS. W. RATTERMAN.

The above security is approved.
(Signed) GEO. R. SAGE,
*District Judge of the United States, S. D. Ohio.*

43 *Oaths of Sureties Attached.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Joseph W. Wilshire, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth twenty thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.
(Signed) JOS. W. WILSHIRE.

Sworn to before me the 19th day of December, 1885.
[L. S.] (Signed) ROB'T C. GEORGI,
*Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, George Wilshire, one of sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth the sum of fifty thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.
(Signed) GEORGE WILSHIRE.

Sworn to before me the 19th day of December, 1885.
[L. S.] (Signed) ROBERT C. GEORGI,
*Dep. Clerk U. S. Circuit Court, S. D. O.*

44 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Joseph N. Kinney, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth fifty thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.
(Signed) JOSEPH N. KINNEY.

Sworn to before me the 19th day of December, 1885.
[L. S.] (Signed) ROB'T C. GEORGI,
*Dep. Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Briggs Swift, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth one hundred thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.
(Signed) BRIGGS SWIFT.

Sworn to before me the 19th day of December, 1885.
[L. S.] (Signed) ROB'T C. GEORGI,
*Dep. Clerk U. S. Circuit Court, S. D. O.*

45 SOUTHERN DISTRICT OF OHIO, *ss:*

I, George Hafer, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth the sum of fifty thousand dollars in real estate, in my own name, situate in the county of Hamilton, in said district.

(Signed) GEORGE HAFER.

Sworn to before me the 19th day of December, 1885.

(Signed) ROB'T C. GEORGI,
*Dep. Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Augustus S. Winslow, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth the sum of fifty thousand dollars in real estate, in my own name, situate in Hamilton county, in said district.

(Signed) AUGUSTUS S. WINSLOW.

Sworn to before me the 19th day of December, 1885.

[L. S.] (Signed) ROB'T C. GEORGI,
*Dep. Clerk U. S. Circuit Court, S. D. O.*

46 And afterward, to wit, on the same day and year last aforesaid, there was issued out of the clerk's office of the court aforesaid in this cause our certain writ of citation in this behalf, directed to the said Lewis Seasongood, sole survivor of J. & L. Seasongood and B. G. Stall and which said writ of citation so as aforesaid issued and directed, with the return of the marshal of the district aforesaid making service of the same endorsed thereon, is hereto annexed as follows, to wit:

47 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Lewis Seasongood, sole survivor of J. & L. Seasongood and B. G. Stall, Greeting:

Whereas The Central Trust Company, a corporation, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio, made in favor of you, the said Lewis Seasongood, sole survivor as aforesaid, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth circuit, this 19th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

GEORGE R. SAGE,
*U. S. District Judge, Southern District of Ohio,*
*Sitting as Circuit Judge.*

48 [Endorsed:] United States circuit court, western division. No. 3554. Central Trust Co., a corporation, *vs.* The T., C. & St. L. R. R. Co. *et al.* Citation to appellee. Filed January 5th, 1886. B. R. Cowen, clerk.

Received this writ at Cincinnati, Ohio, on the 19th day of December, 1885, and on the 28th day of December, 1885, I served the within-named Lewis Seasongood, sole survivor of J. & L. Seasongood and B. G. Stall, by delivering to him personally a true copy of this writ.

H. C. UMA,
*U. S. Marshal, S. D. O.*
By C. A. COSTELLO, *Deputy.*

| | |
|---|---|
| 1 service | 2 00 |
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49 UNITED STATES OF AMERICA,
*Western Division of the Southern District of Ohio:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of the court aforesaid in the cause therein named, in the matter of the claim of Jacob Seasongood, Lewis Seasongood, and Bernard G. Stall, as the same remains of record and on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court aforesaid, at the city of Cincinnati, in said district aforesaid, on this the 21st day of January, A. D. 1886, and of the Independence of the United States of America the one hundred and tenth year.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
*Clerk U S. Circuit Court, S. D. O.*
By ROB'T C. GEORGI, *Deputy.*

Endorsed on cover: S. Ohio C. C. U. S. No. 224. The Central Trust Company of New York, appellant, *vs.* Lewis Seasongood, sole survivor of J. & L. Seasongood and B. G. Stall. Filed February 24, 1886.

# SUPREME COURT OF UNITED STATES.

*Stipulation.*

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant,

*vs.*

LEWIS SEASONGOOD, Sole Survivor of J. and L. Seasongood, and B. G. STALL, Appellees.

For the purpose of avoiding the necessity of suggesting a diminution of the record and of supplying *in extenso* portions of the record in the circuit court which have been inadvertently omitted from the transcript filed in this court, it is agreed that said record shows that on March 29, 1884, a decree of foreclosure and sale was entered in said cause in which the allegations of the bill with respect to the execution and record of said mortgage of October 1, 1880, were found to be true; that there was due from said Cincinnati Northern Railway Company, for interest to that time upon the bonds mentioned in the bill and secured by said mortgage, the sum of $90,000, and that in the event of sale the principal of said bonds, amounting to $1,000,000, would, by virtue of the terms of said mortgage, become due and payable to the several holders thereof; that said railway was sold, pursuant to said decree, on June 27, 1885, for $200,000; that said sale was subsequently confirmed, and that, under said decree, the portion of the proceeds of said sale ordered by said entry of November 20, 1885, to be paid to the appellees would otherwise go to the appellant. The property was of greater value than $200,000, and was purchased by bondholders represented by the complainants.

JACKSON A. JORDAN,
*Of Counsel for L. Seasongood.*
RAMSEY, MAXWELL & RAMSEY,
*For Appellant.*

[Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 224. The Central Trust Co., app't, *vs.* Lewis Seasongood *et al.* Stipulation as to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 18, 1889. James H. McKenney, clerk.

FILED.
JAN 17 1889
JAMES H. MCKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1888.

## No. 224.

THE CENTRAL TRUST COMPANY, of New York, *Appellant*,

*vs.*

LEWIS SEASONGOOD, Sole Survivor of J. & L. SEASONGOOD, and B. G. STALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

## BRIEF FOR THE APPELLANT.

WM. M. RAMSEY,
LAWRENCE MAXWELL, JR.,
*Counsel for the Appellant.*

Printed by JAMES BARCLAY, 124-132 Canal St., Strobridge Building, Cincinnati, O.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM. 1888.

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THE CENTRAL TRUST COMPANY, of New York, *Appellant*,

*vs.*

LEWIS SEASONGOOD, Sole Survivor of J. & L. SEASONGOOD, and B. G. STALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

## BRIEF FOR THE APPELLANT.

### STATEMENT OF THE CASE.

August 29, 1876, the appellees sold lots 13, 14 and 15, of S. Kemper's subdivision, to the Miami Valley Narrow Gauge Railway Company, for the sum of $18,500, payable $2,000 in thirty days, and $16,500 at the end of ten years, with interest at seven per cent. per annum. The vendors retained the legal title. The railway was laid across the lots sold, occupying with its right of way less than one half of them, and leaving the adjacent portions unoccupied. Before the railway was completed it was sold, in April, 1880, in foreclosure proceedings, to which the appellees were not parties, to purchasers who organized the Cincinnati North-

ern Railway Company. The Cincinnati Northern Railway Company completed the railway, forty miles in length, and on October 1, 1880, mortgaged it to the appellant, to secure an issue of $1,000,000 of bonds. The suit in the Circuit Court, from which this appeal is taken, was a suit to foreclose that mortgage. A receiver was appointed on the filing of the bill. The appellees had meantime brought a suit in the Superior Court of Cincinnati, alleging that their purchase money was unpaid, and that they had a lien upon the lots sold for the payment thereof. The Superior Court of Cincinnati so decided, and there is no dispute of the correctness of that decision. Nor can it be denied that the lien of the appellees, on the lots which they had sold, was prior to the lien of the appellant on so much of the railroad as crossed those lots, for the appellees had retained the legal title to the lots, and the appellant, when it took its mortgage, was therefore put upon notice of the appellees' liens. *But the appellees did not have a lien upon the entire railway of the Cincinnati Northern Railway Company. Their lien was only upon the lots which they had sold.*

The error in the decree appealed from, arises from a failure to recognize this simple proposition. Upon the assumption that the appellees had a lien for their unpaid purchase money, not simply upon the lots which they had sold, but upon the entire railway, forty miles in length, they applied to the Circuit Court, and on December 8, 1883, obtained from it an order giving to them a receiver's certificate for the balance of their purchase money, with interest, viz: $25,176.20, which was ordered to be equal in priority with all other certificates that might be issued, but prior to the mortgage lien of the appellant, and to be paid first upon the sale of the road. The portion of the lots not used for right of way, which constituted more than one half of the whole, was ordered to be sold and the proceeds applied upon the

certificate. $525.33 was realized from this source. The entire road, forty miles in length, was sold for $200,000, out of which $27,562.90 was decreed to be paid to the appellees, being the balance of purchase money due them for about 320 feet, or 1-660th part of the whole road.

## ARGUMENT.

The decree of the Circuit Court was based upon a misapprehension of the decision of the Supreme Court of Ohio, in The Dayton, Xenia & Belpre Railroad Company *vs.* Lewton, 20 Ohio St., 401, and upon a misunderstanding, apt to arise when only one side is represented, of the decree of the Superior Court of Cincinnati, in Seasongood *et al. vs.* The Miami Valley Narrow Gauge Railway Co. *et al.* The Superior Court of Cincinnati did not decide that the appellees had a lien upon the entire Cincinnati Northern Railway for their unpaid purchase money, but only upon the lots which they had sold. In such a case the whole road may doubtless be sold, in order to satisfy a lien upon a portion of the road, where the right of the public to maintain the continuity of the railway as a public highway, precludes its sale in sections. And so the Superior Court of Cincinnati, following the decision of the Supreme Court in The Dayton, Xenia & Belpre Railroad Company *vs.* Lewton, held. But where, as at bar, there are other liens upon other portions of the road, the proceeds of the whole must be distributed among the various lien holders upon equitable principles, and with reference to the proportionate value of the separate parts, upon which they have their respective liens, to the whole. The disregard of this principle in the decree appealed from, gives the appellees $27,562.90, instead of something less than $1,000, which would be more than they are entitled to upon the most liberal estimate. In other words, the appellees were placed in the position as against

the appellant, a subsequent purchaser, of having an equitable vendor's lien, not merely upon the property which they had sold, but upon all of the property of their vendee. This was an egregious error, to which The Dayton, Xenia & Belpre Railroad Company *vs.* Lewton gives no support. The equitable lien of a vendor can not, in the nature of things, extend beyond the thing sold. And the decision in Dayton, Xenia & Belpre Railroad Company *vs.* Lewton of course recognizes that fundamental doctrine, as is disclosed in the syllabus, viz:

"Lewton agreed in writing with the Dayton, Xenia & Belpre Railroad Company 'to release the right of way and the right to enter upon and construct its railroad' through his lands. In consideration whereof the company agreed to pay a certain sum of money at a future day, and to construct certain road crossings and cattle guards upon Lewton's land. The company took possession, and constructed its road before receiving a deed for the right of way, and before payment of the money, or constructing the crossings or guards. *Held*, that Lewton is entitled to an equitable lien *upon the property sold*, as well for the damages for not constructing the road in the manner provided for in the contract, as for the unpaid purchase money."

But the appellees seek, in this court, to support the decree appealed from, upon the ground that it was, in legal effect, an order upon the receiver to purchase from the appellees a portion of the right of way, to which title had not theretofore been acquired. But such was neither the limit, effect, nor intent of the order. It was simply what it purports to be,—an order for the payment of a *debt* of the Miami Valley Narrow Gauge Railway Company, out of the property of the appellant, upon the mistaken theory that that debt was a lien upon the entire railway.

But the order would be none the less objectionable, considered as an order upon the receiver to issue certificates for the purchase of right of way.

In the first place, the right of way in question had already been purchased. The Cincinnati Northern Railway Company was not in possession as a trespasser, but by virtue of a contract made by the appellees with the Miami Valley Narrow Gauge Railway Company, to the rights of the latter under which the Cincinnati Northern had succeeded upon its purchase of the road under the first foreclosure, and all that was left to the appellees under that contract was a lien upon the property sold for their purchase money. They could not eject the Cincinnati Northern Railway Company. The rights of the parties were fixed by contract, and the remedy of the vendors thereunder was prescribed by law. The vendors could neither insist upon a second sale at a larger price, nor be compelled to make one at a less price. Both parties were bound by the contract, and the vendors were limited to the remedy, by assertion of a lien, which the law provided for their protection. They could not require a second purchase on any terms, and we submit therefore, that an order for the payment of the appellees, as upon a purchase by the receiver of the right of way, would be erroneous without reference to other objections.

In the second place, the order of December 1883, treated as one for the purchase of property by the receiver, was not confined to right of way, but included in large part outlying real estate, having no connection with the operation of the railway. Furthermore, the price was not fixed at a sum ascertained by the court or by the receiver, to be the value of the property, or, indeed, at a sum having any relation to its value; so that, treating the order as one upon the receiver to purchase real estate, it would be objectionable as

embarking the funds of the mortgagee, without its consent, in an outside real estate venture, and at a price fixed, by a prior contract to which it was not a party. It is plain not only that the order was not, and was not intended to be, an exercise of the power of the court to purchase necessary right of way, but that, if it were such an order, it could not be sustained. That it was not such an order, but simply an order for the payment of the *debt* of the Miami Valley Narrow Gauge Railway Company, as being a first lien, is further manifest from the fact that the certificate was fixed, not at $18,500, the value of the land, outlying portions and all, as estimated upon the former purchase, but at $25,176.-20, being the precise amount of the *debt* of the Miami Valley Narrow Gauge Railway Company, as created by contract in 1876, with interest from that date.

## THE APPEAL IN TIME

The receiver issued a certificate to the appellees some months after the order of December 8, 1883, and on November 20, 1885, the court decreed that the appellees should be paid out of the proceeds of the sale of the railway, the amount of said certificate, less a sum which had, meantime, been realized in the case in the Superior Court of Cincinnati from the sale of the outlying lots, and paid to them. We took an appeal from this decree of November, 1885. It is argued that we are too late; that our appeal should have been from the order of December 8, 1883.

We submit that the order of December, 1883, was not a final decree from which an appeal could be taken. In the first place, it was not a decree at all, but an interlocutory order upon the receiver, made without pleadings or process. As a decree, it would be a nullity. The alleged lien of the appellees could not properly be *decreed* as against the complainant, except upon their becoming parties to the cause,

and filing a cross-bill and issuing process thereon. Washington Railroad *vs.* Bradleys, 10 Wall., 299.

In the second place, if the order of December, 1883, is to be treated as a decree, it is a decree upon a lien asserted by defendants who intervene claiming an interest in the subject of the action, and waiving the objection that it is necessary for such parties to file a cross-bill, make parties defendant thereto and issue process, a decree asserting such a lien, is in the nature of things a decree as upon a cross-bill. But it has been decided by this court that a decree upon a cross-bill is not final, but interlocutory, and that no appeal lies from it. In Ayres *vs.* Carver, 17 Howard, 591, at page 595, followed in *ex parte* Railroad Co., 95 U. S., 221, it was said: "It is manifest from this brief reference to the doctrine, that any decision or decree in the proceedings upon a cross-bill is not a final decree in the suit, and, therefore, not the subject of an appeal to this court, under the twenty-second section of the judiciary act. The decree whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the cause."

How could the Central Trust Company have appealed from the order of December, 1883? The validity of its lien, and its right to relief, was not then adjudged. The issues between it and the defendants were not then made up, much less adjudicated. There was no decree for sale; there was no decree at all, much less a final decree. The theory of appellate procedure in this court is, that there shall not be several successive appeals from the Circuit Court by the

same party in the course of the same cause, but one appeal, and that from the final decree, which is defined as the decree which terminates the litigation of the parties on the merits of the case, leaving none of the issues undetermined. Grant *vs.* Phœnix Insurance Co., 106 U. S., 429, and cases cited.

In Crosby *vs.* Buchanan, 23 Wal., 453, this court said: "Cases can not be brought to this court upon appeal in parcels. We must have the whole of a case or none. The court below must settle all the merits before we accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled, this can not be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree."

A still further answer to the argument of the appellees, arises upon the provision in the order of December, 1883, even treating it as a decree, that the outlying lots should be sold under the proceedings pending in the Superior Court of Cincinnati, and the proceeds applied upon the certificate. Perhaps those proceeds might turn out to be sufficient to pay the certificate in full. If so, the Central Trust Company would have no ground of complaint. It could not determine whether it would be prejudiced until it should appear, by subsequent judicial proceedings, whether the proceeds of the *railway*, in which alone it was interested, were to be resorted to, and if so, to what extent. If in a sum less tham $5,000, it had no right of appeal to this court. The complainant's right of appeal depended (1) upon the taking of the proceeds of the railway to pay Seasongood, (2) to an amount exceeding $5,000. Neither contingency was determined by the order of December, 1883. It can not, therefore, be regarded as a final order. An appeal from it might have involved only a moot question.

It is not true that the receiver was authorized by the order of December, 1883, to pay the certificate out of the earnings of the road at once, or before the result of the sale of the outlying lots was known. The certificate was by the order payable "when the railroad shall be sold, unless sooner paid out of the earnings from the operation of said road or otherwise, *as the court may order*." So that a further order of the court was required, even after the proceeds of the outlying lots had been ascertained and applied, to authorize the appropriation of the earnings of the road to the certificate. But, however that may be, the whole tenor of the order shows clearly that the railroad was not to be resorted to, except for the balance, if any, not satisfied by the sale of the outlying lots. The appellant's rights were, therefore, not in fact finally and substantially affected until the decree of November 20, 1885, was made, which for the first time, took from it a portion of its property, to pay the debt of another. The order of December, 1883, was simply an interlocutory declaration that that would be done in a certain contingency, viz: the failure of the outlying lots to pay the debt.

An order for the issue of receivers' certificates is not a decree, nor in the nature of a decree; it is an order, as distinguished from a decree. A decree is the adjudication of a court upon issues of law or fact raised by pleadings.

In Union Trust Co. *vs.* Illinois Midland Co., 117 U.S., 434, receivers' certificates had been issued during a period of many years, pursuant to successive orders declaring that they should be liens upon the railway, but upon an appeal by bond holders from the final decree of sale and distribution, this court examined and determined the propriety of the issue of the various certificates from the first, and of the liens attempted to be created by them, and decreed distribution in some instances at variance with the unappealed orders of years before, under which the certificates had been issued.

In Porter *vs.* Pittsburgh Bessemer Steel Co., 120 U. S., 649, 677, even a decree of foreclosure and sale, which provided that all unpaid, valid claims against the company for right of way, lands, labor, rolling stock, and material used in the construction and betterment of the railway, were prior, superior, and paramount to the lien of the mortgages and bonds, but without determining who were the holders of such claims, or their amounts, was held not to be a final decree.

We do not deny that the appellees have a first lien upon 320 feet of this railway, but we have a first lien upon the rest of the forty miles, and the proceeds of the sale of the whole road must be distributed between us upon the basis of the proportionate value of the portions upon which we have our liens. It may not be in the mathematical proportion of 320 feet to forty miles, but it must be in the proportion of the fair value, all things considered, of the 320 feet to the whole.

The pretence that the appellees suspended action in the Superior Court of Cincinnati, in reliance upon the order of December, 1883, is immaterial, even if it were true; in the first place, because it was not at the request of the appellant, and in the second place, because it could work no prejudice. The right of the appellees was simply to have the property upon which they had a lien, sold for the satisfaction of that lien. Whether in one court or another, was not material, although it is difficult to see how the Superior Court of Cincinnati could sell a railroad which was in the hands of a receiver of the Circuit Court of the United States.

Respectfully submitted,

WM. M. RAMSEY,
LAWRENCE MAXWELL, JR.,
*Counsel for the Appellant.*

## APPENDIX.

### Supreme Court of United States.

The Central Trust Company of New York, *Appellant.*
*vs.*
Louis Seasongood, Sole Survivor of J. and L. Seasongood, and B. G. Stall, *Appellees.*
*Stipulation.*

For the purpose of avoiding the necessity of suggesting a diminution of the record, and of supplying *in extenso* portions of the record in the Circuit Court, which have been inadvertently omitted from the transcript filed in this court, it is agreed that said record shows that on March 29, 1884, a decree of foreclosure and sale was entered in said cause in which the allegations of the bill with respect to the execution and record of said mortgage of October 1, 1880, were found to be true, that there was due from said Cincinnati Northern Railway Company, for interest to that time upon the bonds mentioned in the bill, and secured by said mortgage, the sum of $90,000, and that, in the event of sale, the principal of said bonds, amounting to $1,000,000, would, by virtue of the terms of said mortgage, become due and payable to the several holders thereof; that said railway was sold pursuant to said decree, on June 27, 1885, for $200,000; that said sale was subsequently confirmed, and that, under said decree, the portion of the proceeds of said sale, ordered by said entry of November 20, 1885, to be paid to the appellees, would otherwise go to the appellant.

The property was of greater value than $200,000, and was purchased by bondholders represented by the complainant.

Jackson A. Jordan,
*Of Counsel for L. Seasongood.*

Ramsey, Maxwell & Ramsey,
*For Appellant.*

RECORD IN THE SUPERIOR COURT OF CINCINNATI.

SUPERIOR COURT OF CINCINNATI, IN HAMILTON CO., OHIO.

JACOB SEASONGOOD, LEWIS SEASONGOOD, and BERNARD G. STALL,
*vs.* *Plaintiffs,*
THE MIAMI VALLEY RAILWAY COMPANY, THE CINCINNATI NORTHERN RAILWAY COMPANY, DANIEL J. FALLIS, JAMES M. SMITH, *Trustees,* TIMOTHY F. RYAN, and JOHN MALLOY, partners as Ryan & Malloy, JOHN B. BENEDICT, THE CENTRAL TRUST COMPANY, of New York, and THE SMITH BRIDGE COMPANY. *Defendants.*

PETITION. Filed May 2, 1881.

Said plaintiffs represent that on November 9, 1874, said Miami Valley Railway Company, defendant, became and was incorporated under the general laws of the State of Ohio, as a railway company, under the corporate name of "The Miami Valley Narrow Gauge Railway Company." That by the consideration of the Court of Common Pleas of Warren county, Ohio, the name of said corporation was changed to said name of "The Miami Valley Railway Company," by which name it has ever since been known. The certificate of incorporation of said company provides for the construction, maintenance and operation of a railroad from the city of Cincinnati, in Hamilton county, Ohio, by way of Mason, Lebanon and Waynesville, in Warren county, Ohio, to Xenia, in Greene county, Ohio.

On August 29, 1876, said plaintiffs were the owners and seized in fee simple and in the possession of the following described real estate situate in the city of Cincinnati, in Hamilton county, and state of Ohio, to-wit: All those three lots of ground in section No. seven (7), town No. three (3), and second fractional range in the Miami purchase, known as lots Nos. thirteen (13), fourteen (14), and fifteen (15), as designated on a plat of subdivision made by S. Kemper and others,

and recorded in book No. 122, page 120, of the Hamilton county, Ohio, records. Said lots being each 66 feet front on the southeast side of the Walnut Hills road, and extending back the same width to the line of the Kemper property, and being the same property conveyed by J. E. Heart, sheriff, December 7, 1872, to Jacob Seasongood, as per deed recorded in deed book W. 406, page 528, and said land was so located that said railroad was located to run through it, and it became desirable and necessary as part of said roadway, and by reason of the great depth of the cut in passing over said land it became and was deemed necessary by said Railway Co., to appropriate said entire lots to said roadway, by reason whereof said property became practically worthless for any other purpose, and it was considered by said parties that the value of the right of way and the damage which would accrue to the residue of said property, would be substantially equal to the entire value of said property, which was agreed by said plaintiffs and said corporation to be $18,500.

On said August 29, 1876, said plaintiffs made an agreement in writing, duly executed, signed, and delivered by said corporation, before its name was changed, and then The Miami Valley Narrow Gauge Railway Company, and also executed by plaintiffs, by which said plaintiffs bargained and sold to said corporation said lots of land for the purpose of said roadway, and put said corporation in possession thereof, but they retain and still hold the legal title to said premises, but by said agreement bound themselves to convey said premises to said corporation, on performance of its part of said agreement, to-wit: Said corporation agreed and bound itself to pay to plaintiffs the sum of eighteen thousand five hundred dollars, as follows: $2,000 in 30 days from the date of said contract, and $16,500 at the end of ten years from that date, and agreed to pay to plain-

tiffs seven per cent. interest per annum upon said $16,500 in installments, payable quarterly during said ten years. And said corporation agreed to pay all the taxes and assessments upon said premises thereafter. All that has ever been paid by said corporation upon said contract, by said corporation, was said $2,000, and the quarterly installments falling due up to May 29, 1878. And from that on, until this time, it has made no payment of interest or principal upon said obligation, and all the installments of interest accruing since May 29, 1878, remain due and unpaid, and the interest thereon. And said corporation has not paid any tax upon said premises since prior to June 19, 1878. That since then and at the following dates said plaintiffs have paid the taxes and assessments upon said property, at the following times, and in the following amounts, all of which was lawfully assessed against said property:

1878, June 19, paid tax due June, 1878, $113.95.
1878, Dec. 19, paid tax due Dec., 1878, $111.75.
1879, June 18, paid tax due June, 1879, $111.75.
1879, Dec. 18, paid tax due Dec., 1879, $113.47.
1879, Dec. 24, paid assessment, $39.02.
1880, June 19, paid tax due June, 1880, $113.47.
1880, Dec. 18, paid tax due Dec., 1880, $121.36.

And there is due to plaintiffs from said corporation said sums of money so paid as taxes and interest thereon from the times of payment.

Said corporation took possession of said property and proceeded to construct its road over the same, and made large excavations thereon, and did partly construct its road over said premises.

On November 1, 1876, said Miami Valley Railway Company, by the name of "The Miami Valley Narrow Gauge Railway Company," which it then bore, executed a mortgage upon its road, rights of way, road bed, tracks, and the

property and franchises of said road and said corporation, to secure bonds payable to said Anthony D. Bullock, or bearer, to the amount of $500,000, which mortgage was executed to said Daniel J. Fallis, and James M. Smith, as trustees for such persons as should become the holders of said bonds, and said mortgage was some time after it was executed, filed for record in the offices of the Recorders of the counties through which said road was located. Some of said bonds were issued and became the property of one David P. Bennett and others; and on April 9, 1879, said Bennett, for himself and others, commenced an action in the Court of Common Pleas, of Warren county, Ohio, to foreclose said mortgage to pay the bonds which had been issued, and made said Fallis and Smith, trustees, parties to said action. All the bondholders were made parties to said action. By the consideration of the court in said action, the court ordered and decreed a sale of said entire road, and its said property and franchises, and ordered a sale thereof to be made by one Nathan Keever, a Master Commissioner of said court, who pursuant to said order did, by due course of legal proceedings, sell the same to Calvin S. Brice, Ozra J. Dodds, Samuel Thomas, Charles Foster, Anthony D. Bullock, George Hafer, John Ryan and M. S. Forbus, for the consideration of $61,000. Said sale was reported to the court, and was confirmed by the court, and a deed ordered, which was executed to said purchasers April 8, 1880, by said Master Commissioner, and which has been duly recorded. Said purchasers for a valuable consideration have conveyed said road and property, and the franchises as far as practicable, to said Cincinnati Northern Railway Company, a corporation duly organized under the laws of Ohio, and said Cincinnati Northern Railway Company have executed a mortgage upon said road and property, and the franchises of the corporation, to the Central Trust Company of New

York, a corporation duly organized under the laws of the state of New York, to secure a large amount of money, which mortgage was duly filed for record in the counties through which said road is located, Nov. 17, 1880. That said mortgage was in the nature of a trust deed, for the benefit of the holders of bonds secured thereby, and plaintiffs have no knowledge whether any of said bonds have been issued.

Said Cincinnati Northern Railway Company, in pursuance of its purchase, has taken possession of said road, and all the improvements thereon, substantially completed the same, laid its track, to some extent have used and operated said road and road bed, passing over said premises, and have appropriated said premises and right of way over the same, with full knowledge of all the rights of said plaintiffs thereto, and without asking their consent, and have assumed and taken possession and control as such purchasers, and by virtue of the franchise which accrued to said purchasers at said Master Commissioner's sale, and which they transferred to said Cincinnati Northern Railway Company, and which thereby inured to it by operation of law, and which franchise it more effectually secured by a reorganization under the laws of Ohio. Said purchasers at said Master's sale are the same persons who have organized and control and own the stock of said reorganization. And said Cincinnati Northern Railway Company have thereby adopted and become liable upon said contract to plaintiffs.

Said other defendants claim an interest in said railroad.

Wherefore, said plaintiffs say that the said Miami Valley Railway Co., and said Cincinnati Northern Railway Company, are indebted to them in the full amount of said unpaid quarterly installments and taxes paid by plaintiffs, and the interest thereon as claimed.

Wherefore, the plaintiffs demand that said railway companies may be called to account. That said railroad, its rights of way, property and franchises, from the city of Cincinnati to Xenia, with all its superstructures, may be sold for the payment of said debt, and interest, and for such other and proper relief as may be equitable.

JORDAN & BETTMAN, and
JORDAN, JORDAN & WILLIAMS,
*Attorneys for Plaintiffs.*

[*Sworn to, etc.*]

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ANSWER OF THE CINCINNATI NORTHERN RAILWAY COMPANY.

Filed February 9, 1882.

Now comes the Cincinnati Northern Railway Company, one of the defendants herein, and for answer to the petition of the plaintiffs says:

*First.* That it denies each and every allegation therein contained, and says the same are not true as therein alleged, except as hereinafter expressly admitted.

It admits that the Miami Valley Railway Company became and was incorporated as a railway company under the laws of Ohio, under the corporate name of the Miami Valley Narrow Gauge Railway Company, which was changed as stated in the petition to that of the Miami Valley Railway Company. That the certificate of incorporation of said last named company provides for the construction of a railroad from Cincinnati to Waynesville. As to the plaintiffs' alleged ownership on August 29, 1876, of the real estate specifically described in the petition, it has not sufficient knowledge whereon to found a belief, it therefore denies such ownership, and demands proof thereof. As to the written agreement alleged and referred to in said petition as having been made and entered into on August 29, 1876, between said

plaintiffs and said The Miami Valley Narrow Gauge Railway Company, it has not sufficient knowledge thereof, either as to its execution, delivery, or terms and provisions, whereon to found a belief, it therefore denies the same and demands strict proof thereof.

The said defendant admits that on or about November 1, 1876, the said Miami Valley Narrow Gauge Railway Company, executed a mortgage to secure certain bonds and coupons thereto attached, payable to Anthony D. Bullock, or bearer, in the sum of five hundred thousand dollars, the trustees named in said mortgage, and to whom it was executed being Daniel J. Fallis, and James M. Smith, and the mortgage was duly filed for record, but it denies that said mortgage covered all of the property of said company as alleged; and it avers that only a portion of the nominal amount of bonds aforesaid were ever sold, but the exact portion and number thereof so sold it is unable to state. It admits that on or about April 9, 1879, David P. Bennett and others brought suit in the Court of Common Pleas, of Warren county, Ohio, to foreclose said mortgage for the payment of the bonds issued as aforesaid; and that the trustees aforesaid and the bondholders were parties to said suit. It admits that a decree and order for sale were made in said suit; that one Nathan Keever was made a Master Commissioner of said court; that said Master made a sale in pursuance of said order to Calvin S. Brice and others, for the consideration of sixty-one thousand dollars; that the sale so made was reported to said court and confirmed; that a deed was executed by said Master to said purchasers and was duly recorded; that the property so conveyed to said Calvin S. Brice and others, has been conveyed to this defendant, The Cincinnati Northern Railway Company, and that the latter company has executed a mortgage upon its road to the Central Trust Company of New York, to secure a large amount of bonds.

As to the alleged occupation of the premises described in the petition, either by the Miami Valley Railway Company or this defendant, it alleges the facts, as it has since its purchase, ascertained them to be as follows: at the time this defendant purchased the road, as hereinabove set forth, the Miami Valley Railway Company had constructed across a portion of said premises, in a direction nearly north and south, a single track narrow gauge railroad, three feet in width, and the entire width of the roadway, as completed and used, did not exceed twenty feet in width. That the entire width of the premises described in the petition, is about two hundred feet throughout the entire length or depth, which latter is about 320 feet; and that outside of the roadway aforesaid, there was nothing whatever to indicate or show that the said premises or any part of them were ever used or intended to be used for railroad purposes; and it avers that at the time of its purchase of the road as aforesaid, and for many months thereafter it had no actual notice or knowledge whatever, that the plaintiffs or any of them had or made any claim whatsoever on account of or concerning any right of way, use or occupancy over or upon any part of said premises.

The said defendant further avers, that on the first day of June, 1881, it caused proper proceedings to be instituted in the Probate Court of this county, to appropriate a right of way for its railroad across the premises, so as aforesaid described in plaintiffs' petition: that the plaintiffs herein were made the defendants in said action, and set up as a defense thereto, substantially the same allegations that are in their petition herein, and that said action is still pending and is untried in said Probate Court.

It further avers that it is the object of said appropriation proceeding to appropriate and pay whatever may be ascertained and fixed as a proper sum for a suitable right of way, such as in said appropriation suit described, across said

premises; that it is ready and willing to pay in cash the full value of such a right of way including damages, if any, to the remainder of the property; and that it now offers to pay into this court such sum as the court may in any proper manner ascertain and declare to be proper for such right of way.

*Second.* The said defendant, The Cincinnati Northern Railway Company, for further answer avers that the said plaintiffs had full knowledge of the commencement of the suit, and of the sale and proceedings as they severally occurred and were had therein, brought by David P. Bennett and others on or about April 9th, 1879, in the Court of Common Pleas of Warren county, Ohio, to foreclose the mortgage for the payment of the bonds referred to in the answer herein; and that this defendant and its grantors had no notice or knowledge whatever that the said Seasongoods and Stall, or either of them, made any claim of or concerning any contract or agreement, or of or concerning their alleged contract or agreement, or that they claimed such a one ever existed as set out in substance in their petition herein, as having been made with the Miami Valley Narrow Gauge Railway Company, until long after the sale (referred to in the petition), and payment of the consideration, were made as between this defendant and its grantors.

Wherefore, said defendant prays that it may recover its costs herein expended, and that it may be granted all proper relief in the premises.

PAXTON & WARRINGTON,
*Attorneys for Defendant.*

[*Sworn to, etc.*]

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ANSWER OF THE CENTRAL TRUST COMPANY OF NEW YORK.
Filed August 13, 1883.

Now comes the Central Trust Company, one of the defendants to the petition herein, and for answer thereto

says, that it knows nothing of the fact as to whether the plaintiffs were the owners of the lands described in the petition at the time therein stated, and for want of such knowledge, denies the fact that said plaintiffs were the owners, and were seized thereof, and were in possession of the same as in said petition is alleged, and for the same reason it also denies that plaintiff sold or made a contract of sale of said lands to the said Miami Valley Narrow Gauge Railway Company, or that said railroad agreed to pay the plaintiffs therefor the sum of eighteen thousand five hundred dollars, and it also denies for like reason that said plaintiffs have paid the amount of taxes upon said lands set forth in said petition. It says that said plaintiffs had actual notice of the foreclosure proceedings in the Court of Common Pleas, of Warren county, Ohio, mentioned in said petition. Defendant further says that it is true that the said Cincinnati Northern Railway Company executed the mortgage mentioned in the petition to this defendant, The Central Trust Company of New York, and that the same was recorded at the time as is stated in said petition. And defendant says that one thousand of the bonds payable October 1st, 1920, secured by said mortgage, amounting to one million of dollars, were issued and sold by said railway company to innocent purchasers thereof, who now own and hold the same, and that said mortgage was executed to this defendant, and the said bonds secured thereby were sold to said innocent holders without any knowledge on their part, or on the part of this defendant, of any claim of the plaintiffs in and to the land in question, and long prior to the commencement of this suit. And this defendant further says that the said Cincinnati Northern Railway Company, at the time said mortgage was made and delivered, and at the time said bonds were issued, had no notice of the said claim of the said plaintiff. And this defendant says that

the premises and property described in petition of plaintiffs is not now and never was of the value of eighteen thousand five hundred dollars; and that the lien of said mortgage is the first and best lien upon the lands in question, and of the said railroad and property of the said Cincinnati Northern Railway Company, and that the plaintiffs have no right to have said railway sold to satisfy their said alleged claim.

HOADLY, JOHNSON & COLSTON,
*Attorneys for the defendant The Central Trust Co.*

[*Sworn to, etc.*]

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JUDGMENT OF THE COURT IN GENERAL TERM. Minutes 308.

This day this cause came on to be heard on reservation to this, the general term of this court, upon the petition of the plaintiffs, and the answer of The Cincinnati Northern Railway Company, and the other pleadings and the evidence certified to this court from the court in special term, and the court find that the defendants, each and all, have been duly served with summons and process in this case; that the Miami Valley Railway Company, and Daniel J. Fallis, and James M. Smith, trustees, Timothy F. Ryan, and John Molloy, partners as Ryan and Molloy, and John B. Benedict, are in default for answer and demurrer, and that the allegations of the petition are thereby confessed by them, and each of them to be true; that the Central Trust Company of New York has adopted as its answer herein, and prayed that the same may be considered and treated as if it were fully and at large set forth, the answer of the Cincinnati Northern Railway Company.

On consideration whereof the court find the equities of the cause in favor of the plaintiffs; that there is due the plaintiffs under the agreement made between the plaintiffs and the Miami Valley Railway Company, before its name

was changed, bearing date August 29, 1876, and referred to in the petition, interest from May 29, 1878, and for taxes on the property described in the petition, which have been paid by the plaintiffs, the sum of seven thousand eight hundred and six, and twenty-two hundredths dollars. This sum includes interest to May 29, 1883, and the taxes until and falling due and payable in June, 1883. The interest and taxes aforesaid which have accrued and become payable since the filing of the petition herein being included upon the waiver by the defendants of a supplemental petition; such waiver, however, being given without prejudice to any and all other objections against including and allowing to be recovered said interest and taxes; and the court finds that said Miami Valley Railway Company in part, and said Cincinnati Northern Railway Company fully have completed, and the latter company now is operating said road through said lots. It is therefore found, ordered, adjudged, and decreed that for the payment of the sum so as aforesaid found to be due and payable, with interest at the rate of six per cent. per annum, together with the balance of the principal sum named in the agreement aforesaid, and remaining unpaid as alleged in the petition, the plaintiffs have the first and best lien upon the lots of land described in said agreement; that unless said sum of seven thousand eight hundred and six, and twenty-two hundredths dollars, together with the interest thereon, and the cost of this action, are paid within ninety days from the date of the entry hereof, by said The Miami Valley Railway Company, or said The Cincinnati Northern Railway Company, this cause shall be remanded to the special term of this court, and Homer F. Jordan, a Master Commissioner of said court, shall, after the court has ascertained and determined the dimensions and locations of so much of the lots of land aforesaid as are not needed for the railroad, cause such portions of said lots

as he shall find as aforesaid to be unnecessary for the railroad, to be appraised and advertised, and sold as upon execution at law; and that he shall report his proceedings to the court at special term; provided, that in so far as said Cincinnati Northern Railway Company, or any one in its behalf, shall pay the money hereinbefore found to be due and payable, together with that declared as aforesaid to be a lien upon the lots of land aforesaid, said company shall be subrogated to all of the rights of said plaintiffs as against said lots of land.

It is further ordered, adjudged and decreed by the court, that in the event that the sum realized from the sale of the portions of the lots of land aforesaid, shall be insufficient to pay the sum of money and interest and costs last aforesaid, the entire railway as owned and operated by said The Cincinnati Northern Railway Company, shall be sold as an entirety. To all of which the defendants, the Cincinnati Northern Railway Company, and the Central Trust Company of New York, excepted. And thereupon said last named defendants moved the court for a new trial, for the reason that the finding and judgment of the court are contrary to the law and evidence, and for other grounds in said motion set forth, which motion was overruled, to the overruling of which, and the judgment aforesaid, the defendants last named excepted; and thereupon the said defendants tendered their bill of exceptions, and asked that the same be allowed, signed, sealed, and ordered to be filed and made a part of the record of this cause, which was accordingly done.

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Further Decree. October 6, 1883. Minutes 75.

This day this cause came on to be heard upon the issue as to the amount of said land described in said petition,

to-wit: said three lots, that is not necessary to said roadway and right of way. And it appearing to the court that the Cincinnati Northern Railway Company, claim and demand that the land described in tract marked "B" hereinafter described, and as shown in plat attached, now occupied by said road bed and tracks, is all that is necessary for the roadway, and the plaintiffs consenting thereto.

And the court finds that the following portions of said lots, designated respectively "A" and "C", on said plat, and described as follows, are not necessary for said roadway, to-wit:

Description of a tract or parcel of land needed for road-bed purposes of part of lots 13, 14 and 15 of Stephen Kemper's subdivision in Cincinnati, Hamilton county, Ohio.

Commencing at a point in the southerly line of Montgomery road and the northeasterly corner of lot No. 15, thence southeasterly along the easterly line of said lot No. 15, sixty (60) feet; thence in a southerly direction through lots 15, 14 and 13, two hundred and eighty-six (286) feet, to the rear or southerly line of said lot No. 13; thence in a southeasterly direction along the rear of said lot No. 13, thirty-seven (37) feet, to the southwesterly corner of said lot No. 13; thence in a northwesterly direction along the westerly line of said lot No. 13, forty-one (41) feet; thence in a northerly direction through lots 13 and 14, one hundred and fifty-two (152) feet; thence northwesterly parallel to the easterly line of lot No. 13, one hundred and forty-six (146) feet, to southerly line of Montgomery road; thence northeasterly along the southerly line of the said Montgomery road, one hundred and twelve (112) feet, to the northeasterly corner of said lot No. 15, and place of beginning, designated on the following plat as part "B."

Description of a triangular shaped tract of land being a part of lots 15, 14 and 13 of Stephen Kemper's subdivision

in the city of Cincinnati, Hamilton county, Ohio, and marked "C" on said plat.

Commencing at a point in the easterly line of lot No. 15, sixty (60) feet, southeasterly from the corner of said lot No. 15, and southerly line of Montgomery road, thence in a southeasterly direction along the easterly line of said lot No. 15, two hundred and fifteen and ninety-seven hundredths (215 97-100) feet, to the southeasterly corner of said lot No. 15; thence southwesterly along the southerly line of lots Nos. 15, 14 and 13, one hundred and sixty-one (161) feet, to a point thirty-seven feet northeasterly from the southwesterly corner of lot No. 13; thence northerly two hundred and eighty-six (286) feet, more or less, to the easterly line of lot No. 15, and place of beginning.

Also another parcel or tract of land being a part of lots 13 and 14 of Stephen Kemper's subdivision, Cincinnati, Hamilton county, Ohio, and marked "A" on said plat.

Commencing at a point in the southeasterly line of Montgomery road and the northwesterly corner of said lot No. 13, thence northeasterly along the Southerly line of Montgomery road eighty-six (86) feet; thence southeasterly parallel to the easterly line of said lot No. 13, one hundred and forty-six (146) feet; thence in a southerly direction one hundred and fifty-two (152) feet, more or less, to a point in the westerly line of said lot No. 13, forty-one (41) feet, northwesterly from the southwesterly corner; thence northwesterly along the westerly line of said lot No. 13, two hundred and seventy-nine (279) feet, to the southerly line of Montgomery road and place of beginning.

It is therefore ordered by the court that said Master Commissioner cause said strip of land as now claimed by said railroad company as a roadway, and now occupied by said company as a roadway, through said lots, and designated as part "B" in said plat, and in connection therewith said entire

railroad to be appraised, and also that said parts marked "A" and "C" which are not necessary for said road shall also be appraised separately, and if the two thirds of the appraised value of said parts marked "A" and "C" do not amount to said judgment and amount found due, interest and costs, then he shall advertise the entire road and said parts marked "A", "B" and "C" for sale, as per former order of this court, and he shall first offer for sale said parts marked "A" and "C", and if they do not sell for sufficient to pay said judgment, interest and costs, then he shall also offer for sale said road as heretofore ordered. And he is ordered to report his proceedings to the court in special term as heretofore ordered, to all of which defendants except.

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APPRAISEMENT. Filed March 10, 1884.

STATE OF OHIO, HAMILTON COUNTY.—*ss.*

I hereby certify that Theodore Cook, Abraham Furst and J. H. Stewart are disinterested freeholders, resident in the county of Hamilton and state of Ohio, and were by me this day first duly summoned and sworn to appraise impartially the premises described in their report hereto attached, upon actual view thereof, at their real value in money, and that they forthwith made the following report.

HOMER F. JORDAN,

December 1, 1883. *Master Commissioner.*

*To Homer F. Jordan, Master Commissioner:*

We, the undersigned appraisers, after being first duly summoned and sworn, forthwith entered upon the premises hereinafter described, and upon actual view thereof, and forthwith after such view, estimate the real value in money of said premises, as follows: We first appraise a triangular shaped tract of land, being part of lots 15, 14 and 13, of Stephen Kemper's subdivision in the city of Cincinnati,

Hamilton county, Ohio, and marked "C" on said plat. Commencing at a point in the easterly line of lot No. 15, sixty (60) feet, southeasterly from the corner of said lot No. 15, and southerly line of Montgomery road; thence in a southeasterly direction along the easterly line of said lot No. 15, two hundred and fifteen and ninety-seven hundredths (215 97-100) feet, to the southeasterly corner of said lot No. 15; thence southwesterly along the southerly line of lots Nos. 15, 14 and 13, one hundred and sixty-one (161) feet, to a point thirty-seven feet northeasterly from the southwesterly corner of lot No. 13; thence northerly two hundred and eighty-six (286) feet, more or less, to the easterly line of lot No. 15, and place of beginning, at $1,000.

We also appraise another parcel or tract of land, being a part of lots 13 and 14 of Stephen Kemper's subdivision, Cincinnati, Hamilton county, Ohio, and marked "A" on said plat. Commencing at a point in the southerly line of Montgomery road and the northwesterly corner of said lot No. 13, thence northeasterly along the southerly line of Montgomery road, eighty-six (86) feet; thence southeasterly, parallel to the easterly line of said lot No. 13, one hundred and forty-six (146) feet; thence in a southerly direction, one hundred and fifty-two (152) feet, more or less, to a point in the westerly line of said lot No. 13, forty-one (41) feet northwesterly from the southwesterly corner; thence northwesterly along the westerly line of said lot No. 13, two hundred and seventy-nine (279) feet, to the southerly line of Montgomery road and place of beginning, at $3,000.

And it appearing that the two thirds of the appraised value of said premises amounts to only the sum of $2,666.67, we also appraise said entire railroad, including that portion of said lots 15, 14 and 13, occupied by and deemed necessary

for said roadway, as designated by said description marked "B," at three hundred and thirty-four thousand, six hundred and eighty-seven and fifty hundredths ($334,687 50-100) dollars.

Witness our hands, this December 8th, 1883.

THEO. COOK,
ABE FURST,
J. H. STEWART.

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RE-APPRAISEMENT ORDERED June 2, 1884. Minutes 53.

It appearing to the court from the report of Homer F. Jordan, Master Commissioner, that the property described in the order directed to him, was duly appraised and advertised, and twice offered for sale, and still remains unsold for want of bidders. It is ordered by the court that the property be re-appraised and advertised, and sold as upon executions at law, pursuant to the former order of the court, by said Master Commissioner.

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RE-APPRAISEMENT filed June 6, 1884. Part "C" appraised at $300, part "A" appraised at $1,290.

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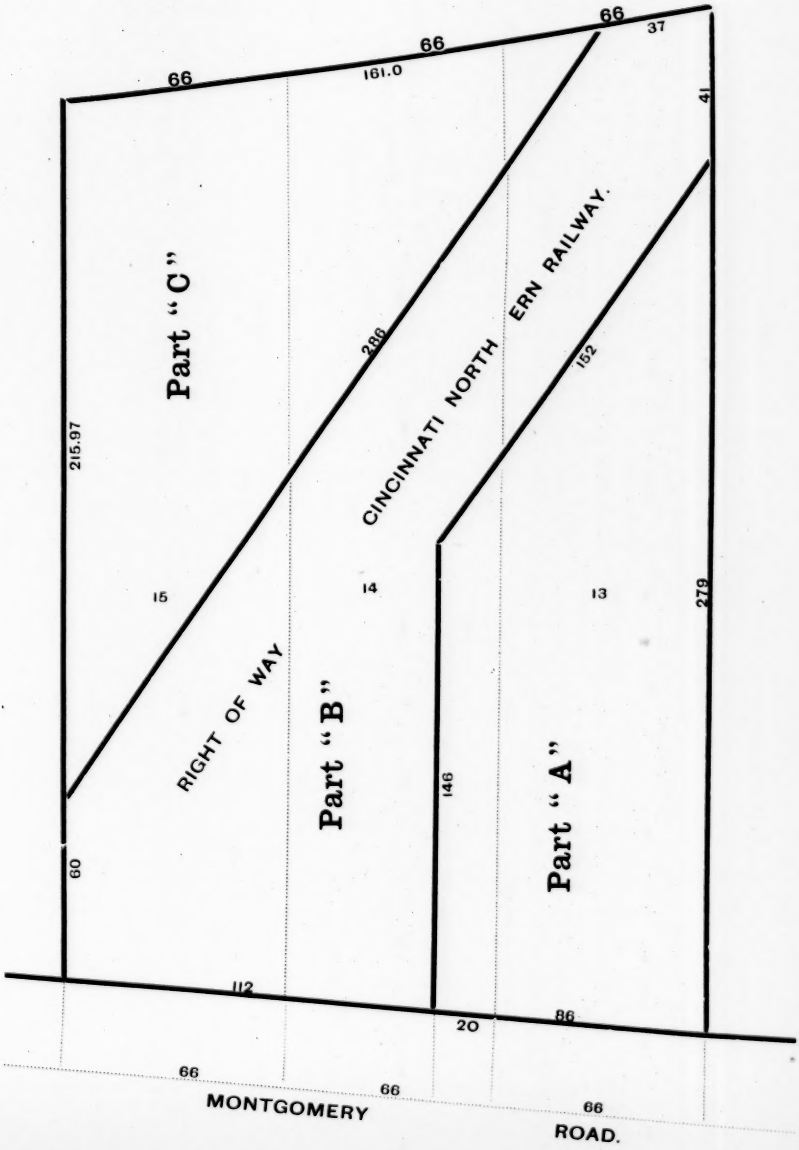
REPORT OF SALE FILED BY MASTER COMMISSIONER, June 6, 1884, showing sale to J. A. Jordan, of part "A" for $861, and of part "C" for $201. Above sale confirmed June 17, 1884. Min. 96.

*PLAT ATTACHED TO DECREE.*



Office Supreme Court, U. S.
FILED.
MAR 19 1889
JAMES. H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

THE CENTRAL TRUST CO

*v.*

LEWIS SEASONGOOD, ET. AL.

**ON APPEAL**

From the Circuit Court of the United States for the Southern District of Ohio, Western Division.

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**Argument of JACKSON A. JORDAN and ISAAC M. JORDAN**
**Counsel for Appellee.**

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Keating & Co., 130 Walnut.

# SUPREME COURT OF THE UNITED STATES.

THE CENTRAL TRUST CO.

*v.*

LEWIS SEASONGOOD, ET. AL.

**ON APPEAL**

From the Circuit Court of the United States for the Southern District of Ohio, Western Division.

---

**Argument of JACKSON A. JORDAN and ISAAC M. JORDAN, Counsel for Appellee.**

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**FACTS.**

In addition to the brief hereto attached on motion to dismiss the appeal, we submit the following: The record in the Court below is very voluminous, and the respective counsel have caused to be printed so much as to them appeared pertinent. What does not appear in the printed record has to some extent been copied into briefs filed. Counsel for complainant have gone beyond the record in this case and copied into their brief some of the proceedings in the Superior Court, referred to in the order for the receiver's certificate complained of, but this is not objected to.

This record shows that on August 29, 1876, Seasongoods & Stall, owned lots 13, 14 and 15 in Cincinnati, and that on that day they sold them to the Miami Valley Railway Co., for $18,500, by an agreement to convey, on which the sum of $2,000 was paid, leaving $16,500 unpaid, which with interest and taxes paid by Seasongoods & Stall now amount to about $30,000.

On foreclosing of a mortgage given by the Miami Valley Railway Co. to trustees, in which proceedings said Seasongoods & Stall were not made parties, the Railroad was sold to a syndicate, and they caused the Cincinnati Northern Railway Co. to be organized and then transferred the road to it, and it executed a mortgage to the Central Trust Co. to secure bonds which were distributed to the bondholders. Seasongoods & Stall were not made parties to said foreclosure proceedings. Thereupon, on May 2, 1881, said Seasongoods & Stall sued in the Superior Court of Cincinnati, Ohio, to foreclose their claim against said property for the unpaid purchase money and taxes and made said Central Trust Co. and said Cincinnati Northern and Maimi Valley Railway Companies, parties. In these foreclosure proceedings there was a prayer to establish the lien and for sale of the entire railroads under the case of Lewton, v. *The Dayton, Xenia & Belpre R. R. Co.*, 20 O. S. R., 401, which so provides.

Complainant's brief goes on to show that answers were filed by said defendants setting up various defenses. Nevertheless the Court decreed for Seasongoods & Stall, and found the amount of unpaid purchase money and taxes to which they were entitled and found the claim to be a lien on the three lots and ordered a sale of the entire road with a view of working out the equity of Seasongoods & Stall. And a Master Commissioner was appointed to conduct the sale, who proceeded and had the road appraised and was proceeding to advertise it for sale.

By this time the Central Trust Co. had commenced a suit to foreclose the mortgage to it by said Cincinnati Northern Railway Company, in the United States Circuit Court for the Southern District of Ohio, and failed also to make Seasongoods & Stall parties. The security which Seasongoods & Stall held for the payment of their claim was:

1st, Such portion of said lots as was not occupied by the roadway. It was very small and of but little value. It sold for about $1,000, and left after paying costs, etc., about $525; 2nd, The portion of the lots occupied as roadway; and 3rd, The claim against the stockholders of the Miami Valley Railway Co. The $525 was applied as a credit on the claim, and the claim against the stockholders was transferred by subrogation to the Cincinnati Northern Railway Co. and it amounted to $5,993.12. The Receiver of the Cincinnati Northern Road was therefore entitled to that amount. This leaves undetermined the value of the roadway through said lots and what would be realized on foreclosure. At the time said receiver's certificate was ordered, on December 8th, 1883, the three items were undetermined.

1st, The amount that could be realized on the outlying strips.

2nd, The amount that might be realized from the stockholders on the claim which at that time amounted to about $25,000. It might have paid the entire claim. And

3rd, The roadway, which, with the outlying strips cost in 1876 $18,500. That was its then value.

It is also shown by the record that the Cincinnati Northern Railway Co. and four other Railway Companies had formed a syndicate for a running arrangement, and the foreclosure proceedings against one was against all and all pending in this one action in the Circuit Court in Cincinnati.

On this condition of affairs the Circuit Court, Baxter J., considered the matter and determined that it would be unwise to allow the interests of the parties in the Cincinnati Northern Road to become detached from the proceedings involving all of the five roads and to let this isolated road pass from the receiver appointed by the Circuit Court, and be sold by a master in the State Court.

And a settlement was ordered by exchanging a receiver's certificate for the rights and interests of Seasongoods & Stall above set forth. This order was made by virtue of an agreement in this action in which The Central Trust Co. representing all the bondholders was and is complainant. It was made without objection, and remained on the record of the Court without motion to set aside until after the receiver's certificate was issued, until the outlying strips were sold, and until it was ascertained what amount could be collected from the stockholders, and until Seasongood stopped proceedings to sell the railroad under the proceedings in the Superior Court, and the judgment in favor of Seasongood was satisfied and a deed releasing the lots to the Railroad Co. was executed and the road was sold in this action. And the Railway Co. went on using the roadway, and the complainant made no objection until the road was sold on foreclosure of a mortgage given to secure $1,000,000, and bought in by the bondholders at $200,000—and until Seasongood applied for an order of distribution November 20th, 1885—about two years after the order was made.

This statement shows that the following payments have been made on the purchase money and still leaves the roadway appropriated to the use of the road:

1st. The $2,000 original purchase money.

2nd. The 525.33 realized on outlying strips.

3rd. The $5,993.12 collected of stockholders which Seasongoods & Stall never received, and to which complainants are entitled.

Total, $8,518.45.

This state of facts raises several

**PROPOSITIONS OF LAW.**

1. That all parties to an action are bound to take notice of the orders made upon its journal as the case progresses. See Equity, rule 4.

2. That notice to The Central Trust Company—trustee binds the bondholders whom it represents.

*Coe* v. *Piqua Road*, 10 O. S. R., 372;

*Wallace* v. *Loomis*, 97 U. S. R., 163;

*Beach on Rec.*, sec. 393.

3. A party is estopped to object to the issuing of a receiver's certificate who acquiesces for two years therein, and especially where such changes are effected in the rights of the parties as are indicated in the foregoing facts.

*Wallace* v. *Loomis*, 97 U. S. R., 163.

4. It is in the power of a court of equity to order a receiver's certificate which may take precedence of a prior mortgage when, when in the judgment of the Court, it is for the interest of all parties concerned.

*Jones on Railroad Securities*, S. 533, and cases cited.

*Union Transfer Co.* v. *Ill. Midland*, 117 U. S. R., 434.

5. The order for the receiver's certificate was made on a contract with Seasongoods & Stall, which has been fully complied with by them, and by the receiver in issuing the certificate. The trustee through the payments made and surrender of the control of the sale of the road, obtained the benefit it agreed for and now

should submit to the order for payment of the certificate.

Briefs have already been filed referring to authorities in support of these propositions.

6. The order of December 8, 1883, ordering the receiver to issue a receiver's certificate to Seasongoods was final and could have been appealed from by either party, and it is too late to appeal from the order of November 20, 1885.

*Blossom* v. *Milwaukee R. R. Co.*, 1 Wall, 655;
*Minnesota* v. *St. Paul*, 2 Wall, 609–634;
*Butterfield* v. *Asher*, 91 U. S. R., 246;
*Hinkley* v. *Gilman*, 94 U. S., 467;
*Sage* v. *Railroad Co.*, 96 U. S. R., 712;
*Trustees* v. *Greenough*, 105 U. S., 527;
*Hovey* v. *McDonald*, 109 U. S. R., 150.

# SUPREME COURT OF THE UNITED STATES.

*THE CENTRAL TRUST CO., Plaintiff,*

v.

*LEWIS SEASONGOOD*, SURVIVOR, ET AL., *Defendants.*

**Appeal from the Circuit Court of the United States for the Southern District of Ohio.**

ON MOTION OF LEWIS SEASONGOOD, SURVIVOR, TO DISMISS APPEAL, AFFIRM JUDGMENT AND ASSESS DAMAGES.

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**ARGUMENT of Jordan & Jordans, Cincinnati, Ohio, Counsel for Lewis Seasongood, Survivor.**

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## REPLY.

A very brief reply seems called for. Counsel for appellant say on page 2, that plaintiff "concedes that Seasongoods and Stall have a prior lien upon so much of the real estate sold by them as was appropriated to right of way for the balance of the purchase price of that portion of the property."

This *should* be conceded. We claim it, *should* claim it, and it is all we claim.

Appellant's counsel then say: "But the appellant denies that Seasongoods and Stall have a lien upon the railway for real estate sold to a former owner of the railway, which never became

a part of the railway, and was never used or intended to be used for railway purposes. This is the point of the appeal."

We deny that Seasongood makes any such claim. Nor is the judgment of the Court predicated on any such claim. No such claim appears in the record. If we are right, then there is no "point" to the appeal, and if it is without point it must be for delay merely and frivolous.

Nothing in the case intimates that the claim for the outlying strips is a lien on the road. The decision in the Superior Court did not so hold. The decree in the Circuit Court of December 8, 1883, makes no such claim. Even if the Superior Court had so held, the Circuit Court was guilty of no error on that account, for the decree of December 8, 1883, recites that thirty days were allowed to take that case up on error, which they did not do. By virtue of the contract made with Seasongoods and Stall the receiver took the claim as it was, "for better or for worse."

All that was decided in the Superior Court and as recited in the decree in this case of December 8, 1883 is, that the claim of Seasongoods and Stall was a lien on the property sold, *not on the road*. And that to satisfy such lien the entire road should be sold. No attempt was made to make the Cincinnati Northern Railway Co. liable for any part of the debt, say nothing about the outside real estate; nor to enforce the payment of any claim for the outlying strips by making it a lien upon the road; nor to enforce the sale of the road to pay it. The decree is particular to avoid this. So appellant's counsel are mistaken in their entire theory of the case.

Appellant's counsel misrepresent the case when they say that "without notice or opportunity to any of the parties to be heard, Seasongood obtained an order directing the receiver to issue a receiver's certificate to them for the entire purchase money of the real estate, including the outlying strips, which latter constituted about two-thirds of the whole."

First—The decree was not *obtained* without notice. The record shows that the Circuit Court made the order for the purpose of stopping the sale under proceedings in the Superior Court, and to obtain a deed for the right of way and the claim of over $5,000 against the stockholders.

Second—The parties certainly did have notice. They were bound to take notice, and it is apparent in the order that all parties did have notice. The Central Trust Co. was a party to the suit in the Superior Court, and is the plaintiff in this action, and the order shows that some of its provisions are by *agreement* of the parties to the action. And this record remained for two years without objection.

Third—Nor is it true that a certificate was ordered or obtained for the entire purchase money of the lots. For the order expressly states that the outlying strips are to be sold and the proceeds credited on the claim.

Fourth—Nor is it true that the outlying strips constituted about two-thirds of the property.

The entire purchase money with interest and taxes now amount to $27,562.90, as shown by the decree of November 20, 1885, and the same decree shows that the outlying strips yielded only $525.33.

The order of the Court was not simply to pay a debt of the Miami Valley Railway Co. It was an order to take from Seasongoods and Stall a transfer of their claim for purchase money and taxes, secured by a decree of the Superior Court making it the first lien on the property, and ordering a sale of the railroad, and also a conveyance of the roadway to the company, and a transfer of the claim against the stockholders, so as to get control of the sale of the railroad in the United States Circuit Court, by reason of which Seasongood gave up all control of the case, and transferred all his rights to the railway company, which availed itself of the benefits thereof.

There could be no misapprehension by the Circuit Court as to the scope of the decree of the Superior Court, for the order of December 8, 1883, recites and follows the exact provisions of the Superior Court decree, and the Circuit Court does not, as is erroneously assumed by appellant's counsel, in its order assume that the entire purchase price could be charged as a lien on a separate portion of the property, nor that the claim for purchase money was a lien on the entire road. It recites exactly what the Superior Court decreed and what the case of *D., X. & B. R. R. Co* v. *Lewton,* in 20 O. S. R., 401, decides.

The order of the Circuit Court recites: "And it further appearing to the Court that said Superior Court of Cincinnati has adjudged and decreed that said plaintiffs have a first and prior lien on said *lots* for the payment of said sums so found to be owing to them, and has ordered that in the event of so much of said lots as may not be necessary for the purposes of said Railway Company being sold and proving insufficient to pay said claims, *then* that the whole of said railway to be sold to pay the same."

Could language be more explicit? How could appellant counsel have made such a mistake? They certainly have read the order very carelessly.

True, the road sold for only $200,000; but when it is understood that a syndicate of some of the bondholders bid it in at a nominal price, the transaction will be plain enough. Getting the railroad at this nominal price is one of the advantages secured to the bondholders by taking the sale of the road out of the Superior Court, and getting Seasongoods and Stall out of the way.

Appellant's counsel complain that Seasongood did not cause himself to be made party and to file a cross bill. Why did not appellant ask that he should be made party? Simply because he was not a proper party to the suit after he transferred all his property to the Railroad Company.

The parties to the suit are the Trust Company and the Railway Company, and they are each interested in the appeal and in having it sustained, while Seasongood, who is the only person to be injuriously affected by an adverse decision, is not a party. This seems to us to be an anomalous proceeding. Its solution may be in an analysis of the action of the Circuit Court. He certainly, for some purposes, must be a party. How can the bond in the Circuit Court act as a supersedeas against Seasongood, if he is not a party? Certainly he can move the Circuit Court for an order for the payment to him of the money? The bond was allowed and given for his protection. He certainly is a proper party defendant in these proceedings? If he is not a party the Circuit Court should not have allowed the appeal. But it did allow it, and, prac-

tically, it and the bond do operate as a supersedeas. If The Trust Co. could appeal, then Seasongood could have appealed; but not without in some way being a party to the suit. Nor can the Trust Company appeal as to him without making him a party. The case is here; but it is here for only one purpose, and that is, to be dismissed and sent back with damages.

Seasongood is brought into this Court by the Trust Company. He is here *de facto*; and, if relief is sought against him, he may resist it. By the act of the Trust Company in bringing this action against Seasongood, he is made a party, and may invoke the aid of the Court to dismiss an appeal which affects his rights by causing a stay of his proceedings to collect his money, by having the orders of the Circuit Court enforced.

In *Bothe* v. *Railway Co.*, 37 O. R. S., 147, the Court held that a judgment of reversal was not bad where the suit to reverse was brought by a person not a party to the suit, but by a subsequent purchaser whose title was affected by the erroneous judgment.

See *Kennedy* v. *St. Paul R.*, 2 Dill, C. C., 448, where the Court held that where there was danger of a valuable land grant being lost to the road, if not completed within a specified time, and this grant constituted the principal security of the bondholders, the Court by its order of appointment, authorized the receiver to borrow money sufficient to complete the road within the time prescribed, and for that purpose to issue his obligations, which were made a lien upon the road.

See also *Ellis* v. *Boston*, 107 Mass. R., 1, Wells J., p. 28.

We find this subject considered in a work just published on *New Trial and Appeal, by Hayne*, P. 611, S. 203, where the case of *Adams* v. *Woods*, 8 Cal., 315, is cited holding that when a receiver employed counsel in a matter of partnership in which he was appointed, and the lawyer applied for the allowance of his fees which were denied him, and it was held that he could appeal from the order denying his petition.

See also *People* v. *Grant*, 45 Cal., 97.

As to the power of the Court to authorize receivers to make such orders see

*Wittenberger* v. *Logansport*, 106 U. S., 286.
310, 2nd *Syllabus*.
*Wallace* v. *Loomis*, 97 U. S., 146.

It seems to us that the Court will act, and that but one action is possible, and that is to dismiss the appeal on one of two grounds: either because the case is not appealable, or because the judgment below is so manifestly right that but one result follows, or a third because two years have elapsed.

J. A. JORDAN, and
I. M. JORDAN,
Attorneys for Lewis Seasongood.

April 16, 1886.

Office Supreme Court, U. S.
FILED,
MAR 5 1889
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] [March, 1889.

# Supreme Court of the United States.

OCTOBER TERM, 1888. No. 224.

*The Central Trust Company of New York,*
*Appellant.*

*vs.*

*Lewis Seasongood, Sole Survivor of J. & L. Seasongood, and B. G. Stall.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

***BRIEF FOR THE APPELLEES.***

C. B. MATTHEWS,
*Of Counsel.*

With J. A. JORDAN, and
I. M. JORDAN.

*Robert Clarke & Co., Printers, Cincinnati.*] [*March, 1889.*

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1888. No. 224.

## *The Central Trust Company of New York,*

*Appellant.*

*vs.*

## *Lewis Seasongood, Sole Survivor of J. & L. Seasongood, and B. G. Stall.*

This case comes up on appeal from a decree of the Circuit Court for the Southern District of Ohio, Western Division. The suit below was commenced by the filing of a bill in equity, by the appellant, to foreclose a mortgage, given to it as trustee, covering the property of The Cincinnati Northern Railway Company. Under that bill, several successive receivers were appointed, to take possession of, and manage, the property covered by the mortgage, and such proceedings were had as finally resulted in a decree directing the sale of the property. Under that decree, the property was sold, and the proceeds distributed. During the administration of the trust—to-wit, on the 8th day of December, 1883—an entry was made (found on page 12 of the printed record), directing the issue of a certain receiver's certificate to Jacob Seasongood, Lewis Seasongood, and Bernard G. Stall. The record shows that no objection was taken to this order of the court, and no appeal therefrom; and on the 20th of November, 1885, a second order was entered, directing the payment into court, by the pur-

chaser of said property, of a certain sum, to be paid to the survivors of the persons named in the former order, who are now appellees in this court, in satisfaction of the receiver's certificate.

The circumstances leading to the issue of the certificate in controversy were these: The three persons named in the order of the 8th of December, 1883, were the owners of certain lands in the city of Cincinnati, and had, previous to the institution of this suit below, contracted to sell them to the Miami Valley Narrow Gauge Railway Company, the predecessors of the said The Cincinnati Northern Railway Company; but they delivered no deed, and retained the title as security for the payment of the purchase money. The Narrow Gauge Railway Company, however, took possession of, and constructed their road-bed and track over the land; and so much of the land as was so used has continued to be in the use and possession of the said The Miami Valley Narrow Gauge Railway Company, and the successive owners of its railroad, to the present time.

On the 2d day of May, 1881, the owners of the property instituted suit, in the Superior Court of the City of Cincinnati, against The Cincinnati Northern Railway Company and the trustee of its bondholders—the appellant in this case and the complainant below—alleging, among other things, that the said Cincinnati Northern Railway Company had, through judicial sale, become the purchaser of the rights of The Miami Valley Narrow Gauge Railway Company; that it was in the use and occupation of the property owned by the plaintiffs in said cause, and said plaintiffs sought to foreclose their lien, and obtain a sale of the railroad property, to pay their claim. Such proceedings were had in that cause as resulted in a decree for plaintiffs, recognizing and decreeing the validity of their lien, and directing the appraisement and sale of the railway as an entirety.

At that stage of the case, The Central Trust Company, the appellant, instituted this suit in the Federal Court,

and thereupon, for the reasons recited in said order, a receiver's certificate was directed to be issued, in payment for said lands. The issuance of this certificate was made dependent upon the following conditions: First, that the plaintiffs in said action in the Superior Court of Cincinnati should enter satisfaction of all of their claims, under said judgment and decree of said Superior Court; second, that they should execute and deliver the proper deed of conveyance of said lots to said Cincinnati Northern Railway Company; and thereupon it was ordered that said Cincinnati Northern Railway Company should stand subrogated to all the rights that said parties had against the said Miami Valley Narrow Gauge Railway Company and the stockholders thereof.

This receiver's certificate was placed upon a par with all other certificates of like nature, and made prior to all other liens. The certificate was issued, the release of the decree in the Superior Court executed, the deed made and delivered, and, under the subrogation clause of the order, the receiver collected something like five or six thousand dollars from the stockholders of the Miami Valley Narrow Gauge Railway Company, as appears by the affidavit filed on the motion to dismiss this appeal. It is now alleged that the court had no power to issue the certificate, and that the only rights the owners of the lands had was to share *pro rata* in the money realized by the sale of the Cincinnati Northern Railway.

# ARGUMENT.

## I.

### MOTION TO DISMISS THE APPEAL.

The first question that presents itself is whether the appeal was taken in time. A motion was made to dismiss this appeal. This motion was reserved until the final hearing. It will be observed that the appeal does not purport to be an appeal from the order of December 8, 1883. In the matter of the Farmers' Loan and Trust Company, petitioner *ex parte*, decided by this court at the present term—to-wit, January 21, 1889—the court held that an order of the Circuit Court in a foreclosure suit, pending an appeal from a decree of foreclosure and sale, authorizing an issue of receivers' certificates, is a final decree, from which an appeal may be taken. In disposing of the case, the court say :

"The question in such cases is not whether the order complained of is of a character decisive of the question that the parties are entitled to have reviewed in the appellate court, but whether the order or decree is of that final nature which alone can be brought to this court on appeal. It is upon this ground mainly that the right of appeal is resisted in the present case; but we are of opinion that, within the true principles which establish the finality of a decree of the Circuit Court, in reference to the allowance of an appeal, this order is a final decree.

"If the order is executed, the first thing to be done under it will be to borrow money to the extent authorized therein, and then the receivers will issue the certificates contemplated in it. It is not necessary to hold here what the position of the holders of such certificates would be, if the order contained no provision that they should be the first lien upon the property of the company. It might be, but it is not necessary to decide that question here, that

such an order would not be conclusive of the rights of the holders of such certificates to priority of payment out of the proceeds of the sale of the railway. It is one of the arguments used before us, that, upon a final sale and an order by the court for the distribution of its proceeds, such certificates would not necessarily be held to have such priority; but that, issued under this order, and containing on their face the provision authorized by it, they would constitute a first lien upon the property of the railway company to be sold under the final decree, is, we think, very clear. Such order standing unrepealed, we do not think that the court, in a subsequent stage of the same litigation, in the same case, and in regard to the same subject-matter, could be permitted to say that the holders of these certificates must establish their right to priority of payment; but we are of opinion that such holders, under the decree of this court that they should have priority standing unreversed, would be entitled to such first lien.

"These views we do not propose to elaborate, further than to say that if this order does not give the lender of money such prior lien upon the proceeds of the property of the company, it is because the court had no authority to make it, and as it would be a fraud upon such lender, justice could only be done by enforcing it. If this view of the subject be correct, of which we entertain no doubt, the order is a final one. It is a decree fixing upon the property, upon which the Trust Company now has the first lien, another lien of $120,000, and making it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this court, and if that decree is affirmed, it, in effect, modifies it, although this court may say that it should stand and be enforced. This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interest in the property."

If there is any difference between the decree in this and the one under discussion in that case, it is simply in

this, that in the one case the order was made before final decree, while in the other it was made after. The decision of this court is that a decree directing the issuing of a receiver's certificate and providing that it shall be prior in lien to a mortgage already existing, is, in its nature final, as between those parties, and while it is true that this court will not take jurisdiction of a case on appeal piecemeal, yet that there may be controversies collateral to the main issues in a cause and between parties, one or more of whom may not be interested in the main issues, a decree upon which would determine the rights of those parties between themselves, is evident. Suits in which railroad property is administered, are in many respects anomalous. In them the court undertakes to take possession of, for the time being, manage, control, operate, repair, sometimes extend, and finally to sell the property and distribute the proceeds. It is necessarily a suit for the administration of a trust, in which many parties may have separate and diverse interests.

In the case of *Miltenberger* v. *The Logansport Railway Company*, 106 U. S. 286, it is said that bondholders may not lie by and see the court and receiver of railroad property dealing with it in the manner there complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, as they did in the cross-bill that the piece of road built under the order of the court, and the other property acquired by the receiver and alleged to have been acquired by him, is theirs without paying the debts incurred for acquiring it. This was said with reference to the issue of receiver's certificates of which the trustee of a prior mortgage complained. In relation to the cross-bill just mentioned, and other matters, the court, at p. 307, says: "Moreover, the cross-bill was not filed for more than a year after the receiver had been appointed, and it was, in judgment of law or in fact, fully known all the time to the first mortgage bondholders, what was being done by the receiver in creating the liens now sought to be disputed; nor was it filed for more than a year after the first mort-

gagee had appeared and answered in the original suit. It was, at all times, competent for the first mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bondholders, in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the complainants in it, or by other bondholders."

Further, on page 308, it is said: "A court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with the receiver, within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him." If it is not sufficient for bondholders simply to protest generally, if they should make a more active objection, there certainly must be means for making this objection effectual. If the court below had directed the issue of receiver's certificates, and made them superior in lien to the mortgage, it is hardly likely that the court, without new light, would reverse its order. Circumstances showing misapprehension or imposition upon the court, would probably induce it to set the order aside; but ordinarily, no other circumstances, and then only in case retraction could be had without damage to innocent parties. We know of no other effectual remedy than an appeal. The views expressed by this court would, therefore, seem to indicate that at any stage of the case such an order is appealable. If this view is correct this appeal should be dismissed.

A glance at a few of the decisions will disclose the distinction upon which this court proceeds in determining the finality of a decree.

In *Whiting* v. *Bank of the U. S.*, 13 Pet. 6, it is said that a decree of foreclosure and sale is final, and the proceedings on the decree are a mode of enforcing the rights of the creditors. At page 15 the court say: "The defendants had a right to appeal from that decree as final upon the merits, as soon as it was pronounced, in order to pre-

vent an irreparable mischief to themselves. For if the sale had been completed under the decree, the title of the purchaser under the decree would not have been overthrown or invalidated by a reversal of the decree, and consequently the title of the defendants to the lands would have been extinguished."

In *Perkins* v. *Fourniquet*, 6 How. 206, where the Circuit Court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a master in chancery to take and report an account, and then reserved all matters in controversy between the parties until the coming in of the master's report, it was held that this was not such a final decree as can be appealed from to this court.

In *Beebe et al v. Russell*, 19 How. 283, the court say: "In chancery a decree is interlocutory when an inquiry as to matter of law or fact is directed preparatory to a final decision. But when a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

Therefore, where a case was referred to a master to take an account of rents and profits, etc., upon evidence and from an examination of the parties, and to make or not make allowances affecting the rights of the parties, and to report his results to the court, it was held that this was not a final decree.

On page 285 the court say: "It is true, a decree may be final, although it directs a reference to a master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary upon the confirmation of the report, *to give the parties the entire and full benefit of the previous decision of the court.*"

In *Thompson* v. *Dean*, 7 Wall. 342, where a decree ordered stock to be delivered by transfer to the complainant, and entitled the complainant to have the decree carried

immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership, the decree was held final.

At page 345 the court say: "In this case the decree directs the performance of a specific act, and requires it to be done forthwith. The effect of the act when done is to invest the transferrees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification was possible after the term, except on rehearing, or by bill of review, or through appeal in this court. So far as the court below was concerned, the decree in the case determined the principal matter in controversy between the parties."

In *Stovall* v. *Banks*, 10 Wall. 583, it was held that a decree which adjudges a certain sum of money to be due from an administrator to each of the distributees of his intestate's estate, and awards execution to collect it, is a final decree, and that an added direction that the defendant be allowed as payment to each of the distributees the amount of any note held by him against them, and also that the several shares of the parties to whom the estate is awarded shall be subject to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator, does not make the decree less final, etc.

In *French* v. *Shoemaker*, 12 Wall. 98, it was held that the ulterior proceedings are but a mode of executing the original decree.

In *R. R. Co.* v. *Swasey*, 23 Wall. 405, the court say in speaking of the decree in the case: "This is but an interlocutory order announcing the opinion which the court has formed as to the rights of the parties and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made."

*Green* v. *Fisk*, 103 U. S. 518, was a partition suit. The

court decreed that A. was entitled to one-half of the property and referred the case to a master "to proceed to a partition according to law under the direction of the court." Held that this was not a final decree, and that an appeal from it would not lie.

In *Trustees* v. *Greenough*, 105 U. S. 527, the court below had ordered in advance of the general distribution certain costs and expenses to be paid out of a fund which was being administered by the court.

The court say: "The first question, however, is whether these orders do or do not amount to a final decree upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of bondholders may continue in the court for a long time to come, etc. The case is a peculiar one, it is true; but under all the circumstances we think the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purpose of an appeal."

It will be observed that where in the above mentioned cases the court has held a decree not final, it is because it is, as the court say, a mere expression of opinion upon the rights of the parties or the declaration of the principles upon which a decree will thereafter be entered, something upon which no action is expected to be taken other than further and final action in the cause itself. Its essential nature is that it does not change the situation of the parties so that further action in opposition thereto would be vain and useless, because the subject matter may have passed beyond the control of the court. It is essential to an interlocutory decree adjudging litigated rights that it should be theoretical merely, so that the court may justly thereafter act either in accordance with or in opposition to it at the final hearing.

But where the very nature of the decree shows that it not only fixes a right but creates a paramount lien, but it is to be carried into effect at once, and thereby, on the one hand, valuable rights are to be vested, and on the other, divested beyond recall, then is such a decree final under

*Whiting* v. *Bank of U. S.*, 13 Pet. 6.

*Trustees* v. *Greenough*, 105 U. S. 527.

And it is none the less final because it may be necessary to take an account.

*Beebe* v. *Russell*, 19 How. 285.

Nor because certain credits may have to be ascertained and allowed.

*Stoval* v. *Banks*, 10 Wall. 583.

In *Porter* v. *Bessemer Steel Co.*, 120 U. S. 649, the order discussed was a mere direction to the receiver and settled no rights whatever.

## II.

### DEFECT OF PARTIES.

The second question that arises is whether or not the necessary parties are before this court upon this appeal. Even if this court should consider the case upon its merits, and should decide that the order complained of was wrong and should be reversed and the receiver's certificate declared a nullity, would this court do so, under the circumstances existing in this case, namely, that, upon the faith of that order, the present holders of the certificate gave up valuable rights? They gave up their decree in the state court, and all claim under it, and deeded their property, which could not have been obtained upon any other conditions than payment. In addition, the receiver has obtained the sum of five or six thousand dollars of the the money of these appellees, under a clause of the order of December 8, 1883, subrogating the Northern Railway Company to appellees' rights against the stockholders of the Miami Valley Narrow Gauge Railway Company. Under these circumstances, would this court nullify the act

of the court below, and declare the receiver's certificate void, without insisting upon that rule of law, which obtains between parties generally, that where a transaction is undone, the parties must be placed *in statu quo*. That involves the restitution, to the holders of the receiver's certificate, of all they parted with in order to obtain it. This order involves the taking of the property, formerly owned by the holders of this certificate, from the purchasers under the decree below and present owners, and restoring it. That can not be done; nor can any order, general or specific, be made in this court, which would secure to the owners of the certificate their lost rights. The purchasers, therefore, should have been made parties to this appeal; and, in their absence, the decree below can not be disturbed.

Of course, this objection would not be tenable, if the question were whether the appellees should have payment in full, or a *pro rata* share merely, for that could not affect the purchaser. But the appellees have never been made parties to the suit below. They would, therefore, retain all their rights, as against the purchaser, and would not be remitted to a claim on the proceeds of sale.

## III.

### MERITS OF THE ORDER.

But, conceding both of these points, the question arises, was the receiver's certificate properly issued, or can its issue be now questioned? Let us recapitulate a little. The Seasongoods and Stall had sold certain property to the Miami Valley Narrow Gauge Railway Company for its right of way. The company went into possession, laid its road-bed and tracks upon the property, but the title was retained by the owners. Their right was something more than a lien. The transaction was, in reality, a conditional sale. The full title to the property could be obtained upon no other condition than the payment of the purchase money in full. They brought their suit in the Superior

Court of Cincinnati, to enforce a lien, under the theory of the case of the *Dayton, Xenia & Belpre Railroad Company* v. *Lewton*, 20 Ohio St. 401, and obtained a decree, as has been mentioned. The Lewton case decides that where a vendor has a lien upon property which, by agreement, has gone into the possession of a railroad company and become a part of its road-bed, he may have one of two remedies. He may have either specific performance decreed, or else may establish his lien, and have a sale of the whole road. This latter is upon the ground that the public have an interest in having the road maintained as a continuous public highway, and, therefore, that it can not be broken up and sold in parcels. This is not the law in England.

In the following cases:

*Munns* v. *Railway Company*, L. R., 5 Chan. Ap. 414.
L. R., 8 Eq. 653.
*St. Germains* v. *Railway Company*, L. R., 11 Eq. 568.
*Keans* v. *R'w'y Co.*, 19 W. R. 43, 318.
*Walker* v. *Ware*, 35 Bevan, 52.
*Winchester* v. *R'w'y Co.*, L. R., 5 Eq. 17.
*Wing* v. *Railway Co.*, L. R., 3 Chan. Div. 740.
*Algood* v. *Railway Co.*, L. R., 33 Chan. Div., 571,

it is held that the remedy of the vendor is to have the particular property sold, and that the public can have no rights other than those of the vendee. This would seem to be just; for where two parties contract, it should not be within the power of one, by commingling the property purchased with his own, to change the rights under the contract. But neither theory makes any difference in the rights of the appellees. The Northern Railway Company became the successor in right to the Miami Valley Narrow Gauge Railway Company, in other words, the purchaser of its rights. Continuing in the occupation of the property mentioned as such successor of the Miami Valley Narrow Gauge Railway Company, it became bound by the terms of its contract. At least it could acquire no property in the lots owned by the appellees, except under the condi-

tions of the contract under which possession had been originally taken.

*Pfeifer* v. *Sheboygan & Fond Du Lac R. R. Co.*, 18 Wis. 155.

*Fries* v. *Sou. Penn. R. R. & Mining Co.*, 85 Penn. St. 73.

Electing to occupy as such successor in right, the vendors could exercise the same rights against them as against the original purchasers. It does not matter that the decree in the Superior Court case was based upon a lien. All claim under that decree was released. It was the right of the court below to compel its receiver to specifically perform the contract with the Seasongoods and Stall, or to purchase a right of way, for in effect they are the same. It would be useless to consume time or to cite authorities at this late day to show the authority of the court under such circumstances. It is not a gross irregularity, as is claimed, to make such an order without the filing of pleadings. It is not necessary, whenever in the operation of a railroad, a purchase of ties, rails, or other materials of any description is contemplated, to litigate the matter *inter partes*. Such a course would make it entirely impracticable to exercise the jurisdiction of the court at all in such matters. The order granting the receiver's certificate in this case was the ordinary order made in the usual manner. It was made at a time when and in a suit where the appellant was a party and the complainant. The persons receiving the certificate acted upon it, gave up the rights already mentioned; the record shows that no objection was made of any description for nearly two years. We confidently claim that outside of the injustice of attempting to undo such a transaction, under any circumstances, the receivers of the certificate had a right to rely upon the presumption that what was done was done with the consent of the complainant and those whom it represents.

It is said in Beach on Receivers, sec. 399, that if any objection is to be made to the issue of receiver's certificates, it must be made before they are actually issued, citing

*Humphreys* v. *Allen*, 101 Ill. 490, and *Langdon* v. *Railroad Co.*, 53 Vermont, 265. These cases fully sustain the text. The quotations from the Miltenberger case and *in re* Farmers' Loan and Trust Company case, *supra*, are extremely pertinent in this connection, and inferentially adjudicate the same proposition.

In the case of *The Union Trust Company* v. *The Illinois Midland Railway Company* (117 U. S. 434), where certificates in large amounts had been issued before the trustee of one of the mortgages was a party, the court, after quoting the following language of Mr. Justice Bradley from *Wallace* v. *Loomis*, 97 U. S. 146:

"The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and improve the same, chargeable as a lien thereon for its repayment, can not at this day be seriously disputed. It is part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund"—proceeds: "It is true that the second mortgage trustees, in that case, were parties to the suit when the order was made, and had due notice of the application and made no objection. As to that, the court said that the bondholders were represented by their trustees, and must be regarded as bound by their acts, at least so far as concerned the power of the court to act, in making the order, and so far as the interest of third persons, acting upon the faith of it, might be affected. It also said that when the appellant became a party, he suggested no objection to the terms of the order appointing the receivers, and that there was no just exception to the order or the decree." The court then proceeds: "Property subject to liens, and claims, and debts, of various characters and ranks, which is brought within

the cognizance of a court of equity for administration and conversion into money and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes; improved property should be rented; movable property that is not perishable may be locked up and kept, but, if perishable, it must be sold by way of preservation. A railroad and its appurtenances is a peculiar species of property." Again: "Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view that if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and, under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice."

The court then holds that the receiver and those lending money to him on certificates issued on orders made without prior notice to the parties interested, take the risk of the final action of the court in regard to the loans. On page 459, it is said: "In regard to the fact that neither the Paris and Decatur bondholders, nor their trustees, were parties to the suit when the order of October 9, 1876, was made, the commissioner took the view, which the circuit court affirmed, that while they ought to be heard before the order was made conclusive against them, yet, as the objections to the merits of the order would not have been availing if made before it was entered and the money

had been actually and faithfully applied, under the order of the court, to improvement of the mortgaged property, no equitable reason appeared why the bondholders should keep the benefits and escape the burden."

In reference to orders made when that trustee was a party to the suit, the court says: "Under these circumstances the Paris and Decatur trustee, and its bondholders in court through it, can be heard to make no other objections to the orders except such as arise as to the merits of the expenditures made under them. The view of the commissioner of the Circuit Court was that the bondholders should have such rights and equities as they could have properly claimed as parties *ab initio*, and that this view should apply against them as well as for them. In this we concur." And further the court says: "As to receiver's certificates issued with the sanction of the court after the trustees became parties, the purchasers and holders should be accorded such rights as by the settled principles of equity are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

It would seem to be well settled, therefore, that upon the plainest principles of equity the appellant in this case should now be estopped from questioning the order directing the issue of the certificate. The company was a party to the suit. The owners of the certificate had the right to assume that it consented, and the record shows that it made no objection. It was an order that was to be acted upon by the owners of the property, and under which in return for the certificate they were to release valuable rights, and more than in ordinary cases it behooved the Trust Company to make known its objection and resistance at the earliest possible moment. The objection now is not that the order was injudicious or erroneous, but can only be that it was void. It is claimed that the only right of the appellees was to share *pro rata* in the proceeds of the sale of the railroad. It is argued that they had no lien upon the road, but their lien was confined to the very property they had sold, and this is given as the reason why their only right was as above indicated, but it is the very

reason why the remedy was not such. The argument is in supposed analogy to those cases of apportionment decided under mechanics' lien laws where mechanics are given prior liens upon the improvements put by them upon lands. Cases have arisen where the naked land was incumbered by mortgage, and where not provided for by statute the question has occasionally arisen as to how the lien should be worked out. The improvement necessarily becomes part of the land, not only in the eye of the law but physically. The lien holder could not be paid by removing it and they are treated therefore as having liens *pari passu* upon one subject matter, but in proportion to the value which each has contributed, but their liens are upon the same thing. That is not the case here. No act of the railroad company could divest the vendors of their contractual rights, and the idea broached above as to the remedy of the vendor can only be based upon the theory that the vendor's lien upon the specific property is divested, and that he is given a lien *pari passu* with the mortgagee upon the one subject-matter, each to share in the proceeds according to the amount, we may say, of capital contributed by each to the common fund. But a landowner's property does not become a part of a railroad in the sense that a house becomes part of the land when it is put on it. Nor is the lien by necessity spread over the whole thing of which it becomes a part. It is said that it is the interest of the public that the railroad should remain intact. But the duty to the public is owing by the owners of the railroad and not by the vendors of the land; and therefore if any detriment comes from a mixture of the property, it must come to him who has undertaken the duty without having the means and instruments to perform it. It is very well known that there could be no justice in remitting the vendor of land to what is termed an equitable share of the proceeds of the sale of a railroad, when his land separately may have been of great value. It is perfectly well known that railroad property has a limited number of purchasers, and is frequently if not generally bought in by its bondholders for a sum very much below its value.

But this contention is disposed of by the fact that the appellees were not parties to the suit below, and therefore were neither entitled to nor could they be compelled to share in the proceeds of sale. On the merits, the decree should be affirmed.

Respectfully submitted,

C. B. MATTHEWS,
*Of Counsel.*

With J. A. JORDAN, and
I. M. JORDAN.

# SUPREME COURT OF UNITED STATES.

*Stipulation.*

THE CENTRAL TRUST COMPANY OF NEW YORK, Appellant,

*vs.*

LEWIS SEASONGOOD, Sole Survivor of J. and L. Seasongood, and B. G. STALL, Appellees.

For the purpose of avoiding the necessity of suggesting a diminution of the record and of supplying *in extenso* portions of the record in the circuit court which have been inadvertently omitted from the transcript filed in this court, it is agreed that said record shows that on March 29, 1884, a decree of foreclosure and sale was entered in said cause in which the allegations of the bill with respect to the execution and record of said mortgage of October 1, 1880, were found to be true; that there was due from said Cincinnati Northern Railway Company, for interest to that time upon the bonds mentioned in the bill and secured by said mortgage, the sum of $90,000, and that in the event of sale the principal of said bonds, amounting to $1,000,000, would, by virtue of the terms of said mortgage, become due and payable to the several holders thereof; that said railway was sold, pursuant to said decree, on June 27, 1885, for $200,000; that said sale was subsequently confirmed, and that, under said decree, the portion of the proceeds of said sale ordered by said entry of November 20, 1885, to be paid to the appellees would otherwise go to the appellant. The property was of greater value than $200,000, and was purchased by bondholders represented by the complainants.

JACKSON A. JORDAN,
*Of Counsel for L. Seasongood.*
RAMSEY, MAXWELL & RAMSEY,
*For Appellant.*

[Endorsed:] Sup. Court U. S. 1888, Oct'r term. No. 224. The Central Trust Co., app't, *vs.* Lewis Seasongood *et al.* Stipulation as to record.

[Stamped:] Office Supreme Court U. S. Filed Jan. 18, 1889. James H. McKenney, clerk.

Supreme Court of the United States.

THE CENTRAL TRUST CO. OF N. Y.
*vs.*
LEWIS SEASONGOOD *et al.*
} No. 224. Oct. Term, 1888.

It is agreed that the record in Jacob Seasongood *et al. vs.* The Miami Valley Railway Co. *et al.* in the superior court of Cincinnati (printed as an appendix to the brief of counsel for appellant), shall be treated and regarded on this appeal as if the same had been filed in the circuit court and were a part of the record in this case in the circuit court and on this appeal.

LAWRENCE MAXWELL, JR.,
*Counsel for Appellant.*

J. A. JORDAN,
*Counsel for Lewis Seasongood.*

[Endorsed:] U. S. Supreme Court. 1888, Oct'r Term. No. 224. Central Trust Co., App't, *vs.* Seasongood *et al.* Stipulation as to record in superior court of Cincinnati. Filed April 1, 1889.